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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOSEPH C. LEMIRE, JON T. STEPHENS,
LIONEL W. ACHUCK and INTERCONEX, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether a general verdict of conviction returned by a jury instructed on alternative legal theories, one of which failed to state a crime, must be vacated?

2. Whether a defendant's rights to due process and a civil jury trial are violated by a district court order requiring a substantial payment in restitution when (a) it is impossible to ascertain from the jury's verdict whether it found any economic harm to the alleged victim; and (b) where the trial court held no hearing to determine whether there was any economic harm and, if so, the amount?

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No. 83——

JOSEPH C. LEMIRE, JON T. STEPHENS,
LIONEL W. ACHUCK and INTERCONEX, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit affirming judgments of conviction entered in the United States District Court for the District of Columbia.

OPINION BELOW

The opinion of the court of appeals is reported at 720 F.2d 1327 and is printed in Appendix A, *infra*, pp. 1a-50a.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 1983 (Appendix B, *infra*, p. 51a). A timely petition for rehearing, with a suggestion for rehearing

en banc, was denied January 11, 1983 (Appendix C, *infra*, pp. 52a-53a).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

The Seventh Amendment to the United States Constitution provides in pertinent part:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .

STATUTES INVOLVED

The relevant portions of 18 U.S.C. §§ 371, 1343, 2314 and 3651 are set forth in Appendix E, *infra*, pp. 66a-70a.

STATEMENT

Introduction

Petitioners were indicted on five counts of wire fraud, 18 U.S.C. § 1343; one count of transportation of the proceeds of the fraud in foreign commerce, 18 U.S.C. § 2314; and one count of conspiracy, 18 U.S.C. § 371. The indictment charged the petitioners with a single scheme to defraud the Raytheon Company in two separate and distinct ways: (1) the first was to defraud Raytheon

of money by charging excessive rates for certain shipping services; (2) the second, based upon what the court of appeals held was an erroneous interpretation of the wire fraud statute, was to defraud Raytheon of the loyal services of two of its employees (C.A. 134-51).[1]

At the conclusion of the trial, the jury was instructed that it could convict if it found that the petitioners schemed to defraud Raytheon either of money or of the loyal services of its employees (C.A. 3389-90). The jury returned a general verdict of guilty on all counts.[2] It was thus impossible to tell from the verdict whether the jury had found that the petitioners schemed to defraud Raytheon of money, the loyal services of the two employees, or both.

The court of appeals held that the portions of the indictment and the instructions relating to the scheme to defraud Raytheon of the loyal services of its employees were founded upon an impermissibly broad interpretation of the wire fraud statute. Despite the impossibility of determining from the general verdicts whether the convictions rested in any way upon that improper theory, and thus whether petitioners were convicted for conduct that is not a crime, the court of appeals affirmed.

Statement of Facts

In June 1976, the Raytheon Company was awarded a $1 billion contract to install an air defense missile system in Saudi Arabia (C.A. 1204). As part of that contract, Raytheon agreed to supply 220 prefabricated houses to the Saudi military (C.A. 3679). This case arose from the procurement of those houses and their transportation from the United States to Saudi Arabia. After signing the missile contract, Raytheon solicited competitive bids from prefabricated housing suppliers (C.A. 3782-35).

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[1] References herein to "App." are to the Appendix to the Petition; references to "C.A." are to the Appendix filed in the court of appeals.

[2] One of the wire fraud counts, however, was dismissed by the trial court at the close of the government's case (C.A. 2279-81).

The bidders were instructed to quote not only the cost of the houses, but also the cost of transporting them to Saudi Arabia (C.A. 1146-47, 3734-35). Joseph Lemire, one of the petitioners, was the Raytheon official who had the initial responsibility for this procurement (C.A. 1153-59).

1. *The Alleged Monetary Fraud*

Three responsive bids were submitted to Raytheon. The lowest was submitted by International Modular Systems, Inc. ("IMS") (C.A. 3732). As part of its bid, IMS proposed that the houses would be transported to Saudi Arabia by petitioner Interconex, a freight-forwarding company owned by petitioners Jon Stephens and Lionel Achuck (C.A. 3746, 3750). Interconex had done substantial shipping for Raytheon in the past (C.A. 918, 3675-78). The IMS-Interconex bid was $1.25 million, or 12.4% lower than the next lowest bid.[3] This uncontested fact was relied upon by petitioners at trial in support of their argument that Raytheon was not defrauded of any money.

The bulk of the difference in the housing bids lay in the lower transportation rates offered by Interconex. The transportation rate in the IMS-Interconex bid was $91.11 per ton as compared with rates of $115.07 and $125.39 offered by the two competing bidders (C.A. 1150). Accordingly, with the approval of Raytheon corporate officials, the contract was awarded to IMS[4] (C.A. 1161-62, 3670).

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[3] IMS bid $8,812,800 for the total cost of supplying and delivering all 220 houses; Bendix bid $10,064,800; and Atlantic International bid $12,366,660 (C.A. 3737).

[4] The contract was approved by the head of procurement for Raytheon's Missile System Division, Raytheon's corporate subcontract manager, and Raytheon's manager of corporate traffic and transportation (C.A. 1161-62, 3670). Subsequently, following a second competitive bidding process, IMS was awarded a contract to supply an additional 121 housing units and again used Interconex as its shipper.

Interconex chartered vessels to transport the houses to Saudi Arabia. As a result of favorable charter rates, it earned a gross profit of approximately $700,000 on each of three voyages.[6] Pursuant to an agreement with IMS, that amount was paid by IMS to the Swiss bank account of Generation Holdings, a company controlled by Stephens and Achuck (C.A. 630-31, 696-97, 3787).

The indictment charged that Interconex's shipping rates for the houses were inflated (C.A. 137). At trial, however, when confronted with the evidence that the Interconex rates were substantially lower than those offered by the competing bidders, the prosecution contended that IMS was favored in the bidding process, an assertion contradicted by the Raytheon employee who solicited the bids (C.A. 1134-40). The prosecution also argued that Raytheon could have saved money by chartering vessels itself. However, it was undisputed that no one at Raytheon had any experience in chartering vessels[7] (C.A. 1365, 1442, 2488). Indeed, according to three Raytheon officials, the company had an exclusive shipping contract with Waterman Steamship Lines at a rate higher than that offered by Interconex, which prohibited it from chartering a vessel of its own (C.A. 1537, 2465-66, 2748-49). Thus, there was evidence that it would have been more expensive for Raytheon to ship the houses itself than to have IMS subcontract the transportation to Interconex (C.A. 1427, 1485, 2462-69, 2481-82, 2748-49). In short, the question whether Raytheon was defrauded of any money as a result of the procurement process was a close one that was hotly contested throughout the trial.

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[6] This gross profit figure does not take into account Interconex's overhead expenses. During the relevant years, Interconex's overhead ranged from 21% to 27% of sales (C.A. 2315).

[7] The proof showed that in eleven years of operating in Saudi Arabia Raytheon had never chartered a vessel, nor had it done so in any other international operation (C.A. 1365, 1442, 2488).

2. *The Alleged Fiduciary Fraud*

The indictment also alleged that petitioners deprived Raytheon of the loyal services of two of its employees, Lemire and Roy Carver, its senior representative in Saudi Arabia.[7] There was evidence at trial that a portion of the $2.1 million transferred to the Swiss bank account of Generation Holdings was subsequently transferred to companies owned by Carver and Lemire (C.A. 3879-93). The prosecution also introduced evidence of Raytheon's conflict-of-interest policy and statements by Carver and Lemire that they understood the policy and would abide by it[8] (C.A. 1504-07, 3697-3701).

Although such "moonlighting" on the part of Raytheon employees was arguably forbidden by the Raytheon conflict-of-interest policy, Lemire testified that he, carver and Stephens had been engaged since 1974 in seeking business opportunities in Saudi Arabia unrelated tot he business of Raytheon (C.A. 2433-38). The businesses they eventually formed generated $25-$30 million in sales and made proposals for $100 million in other projects (C.A. 2585). Lemire testified that the transfer of money from Generation Holdings represented Stephens' contribution to the capital of these joint ventures (C.A. 2495, 2516). He denied that there was any relationship between the award of the housing contract to IMS and the funds he and Carver received from Stephens[9] (C.A. 2592-94, 2702). Lemire testified that

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[7] Carver was originally indicted with petitioners, but his case was severed before trial. After the verdicts and sentencings, Carver pled guilty. His plea was pursuant to *North Carolina* v. *Alford*, 400 U.S. 25 (1970), and, while he acknowledged that he had private business interests with Stephens at the time Intervenor was awarded the shipping contracts, Carver nowhere admitted that Raytheon was defrauded of any money.

[8] The conflict-of-interest policy prohibited Raytheon employees from accepting items of value from any Raytheon supplier (C.A. 1505-06).

[9] Lemire did not know Stephens' sources of funds and, indeed, had no knowledge of Generation Holdings prior to the investigation preceding the indictment (C.A. 2542-43).

the bidding process was fair (C.A. 2592-94), and he insisted that Raytheon saved substantial amounts of money as a result of IMS subcontracting with Interconex at a shipping rate much lower than the Waterman rate (C.A. 2484).

3. *The Jury Instructions*

The prosecutors sought and obtained an instruction that permitted the jury to convict if it found a scheme *either* to defraud Raytheon of money through excessive shipping charges *or* to deprive Raytheon of the loyal services of Lemire and Carver. The prosecutors made clear that the government sought this instruction to enable it to argue that the undisclosed receipt of funds by Carver and Lemire was sufficient to convict, regardless of any quantifiable economic injury to Raytheon's business. The prosecutors told the court: "[W]e think the jury should be absolutely clear . . . that [they] can convict on either theory and should be so instructed. It's absolutely crucial" (C.A. 3108).[10]

As the court of appeals later noted (App. 18a-19a), the key passage of the trial court's jury instructions was the following instruction on the alleged wire fraud scheme:

> the first alleged object was to defraud Raytheon Company of its right to the honest, conscientious,

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[10] Anticipating defense closing arguments based on the substantial evidence at trial that Raytheon suffered no business harm and indeed may have saved money by awarding the housing contract to IMS, the prosecutors argued:

> Your Honor, . . . we're going to hear about two hundred minutes of argument to the jury . . . that Raytheon lost no money.
>
> We don't think that they can survive this case solely on this argument. It doesn't deal with the fact that Carver and Lemire received eight hundred and forty-four thousand dollars without disclosing, and actively concealing the source of those funds and the relationship to Mr. Stephens and Interconex and Mr. Ashmik.

(C.A. 3108).

> faithful, loyal, disinterested and unbiased services, actions, and performances of duties by its employees Carver and Lemire, free from bribery, corruption, partiality, willful omission, bias, dishonesty, deceit, misconduct and fraud.
>
> . . . .
>
> Now the object of the scheme need not be money or any form of tangible property. The government need not prove any actual loss of money by the Raytheon Company.
>
> A scheme to defraud an employer of the honest, faithful and unbiased services of its employees can also come within the meaning of scheme or artifice to defraud as set forth in the wire fraud statute.

(App. 18a-19a) (citing C.A. 3389-91). As the prosecutors argued, the government wanted the jury to understand that when the court instructed that the jury could convict only if it found that "some actual harm or injury was at least contemplated" by the defendants, that the "actual harm or injury contemplated [could] be *the deprivation of the honest, loyal and unbiased services of employees*" without any actual economic injury (C.A. 3061) (emphasis supplied).

Near the close of its first day of deliberations, the jury requested reinstruction on the elements of wire fraud. In the course of the reinstruction the trial court twice stated that the government was required to prove a scheme to defraud with *one or both* of two objects: to deprive Raytheon of the loyal services of Carver and Lemire *or* to obtain money from Raytheon by means of false pretenses.[11]

The jury subsequently returned general verdicts of guilty against all defendants on all counts.

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[11] The full text of the reinstruction is set forth in Appendix F, *infra*, pp. 71a-73a.

The trial court sentenced Stephens and Lemire to five years imprisonment, placed Achuck on probation, and imposed a total of $1.75 million in restitution against Stephens and Achuck.[12]

4. *The Court of Appeals Decision*

On appeal the petitioners challenged their convictions on the ground, *inter alia*, that the instructions permitted the jury to convict if it found that Raytheon had been deprived of the loyal services of Carver and Lemire even if petitioners neither caused nor intended to cause monetary loss or other actual detriment to Raytheon's business. The government argued in the court of appeals, as it had in the district court, that it was unnecessary to prove any economic harm so long as Raytheon was deprived of the loyalty of its employees.

The court of appeals "agree[d] with the defendants that the government's interpretation of the wire fraud statute encompasse[d] too much" (App. 9a). Rejecting the government's theory, the court held that "an intentional failure to disclose a conflict of interest, without more, is not sufficient evidence of the intent to defraud an employer necessary under the wire fraud statute" (App. 13a) (footnote omitted). The employee must also "have contemplated some concrete business harm to his employer stemming from his failure to disclose the conflict . . . ." (App. 14a).

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[12] Lemire was sentenced to six concurrent 5-year prison terms; Stephens received five concurrent 5-year prison terms, and a consecutive 5-year term, execution of which was suspended on condition of payment of $1 million in restitution; and Achuck was given six concurrent 1 to 3-year prison sentences, execution of which was suspended, and he was placed on probation for 5 years on condition that he perform 300 hours of community service and pay $750,000 in restitution. Each individual defendant was fined $10,000, and Intercomm was fined $24,000 (App. 54a-55a).

The court framed the decisive question as "whether an indictment *and* instructions based on two alternative theories of guilt, one of which may not correctly reflect our interpretation of the law, can lay a sound basis for a conviction" (App. 32a) (emphasis in original). Notwithstanding its conclusion that the indictment, as well as the instructions, set forth an invalid legal theory, creating the possibility that petitioners were convicted for conduct that is not criminal, the court of appeals refused to reverse. Instead, it reviewed the record to determine whether there was evidence that the jury had acted on the erroneous theory. The court concluded that the record did "not support an inference that the jury acted pursuant to [the] impermissibly broad interpretation of the statute" (App. 9a).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS INCONSISTENT WITH THIS COURT'S PRIOR DECISIONS AND CREATES A CONFLICT IN THE CIRCUITS

The court of appeals' decision is directly contrary to the rule established by this Court in *Stromberg* v. *California*, 283 U.S. 359 (1931), and its progeny. In *Stromberg* the jury returned a general verdict of guilty after being instructed that it could convict the defendant under any one of three clauses of a statute, one of which this Court subsequently held unconstitutional. This Court overturned Stromberg's conviction, holding:

> The verdict against the appellant was a general one. It did not specify the ground upon which it rested. . . . It follows that instead of its being permissible to hold, with the state court, that the verdict could be sustained if any one of the clauses of the statute were found to be valid, the necessary conclusion from the manner in which the case was sent to the jury is that, if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld.

283 U.S. at 367-68. *See also, e.g., Terminiello* v. *City of Chicago*, 337 U.S. 1, 5-6 (1949); *Williams* v. *North Carolina*, 317 U.S. 287, 291-92 (1942).

The *Stromberg* rule is equally applicable where one of the alternative theories is legally invalid. As this Court explained in *Haupt* v. *United States*, 330 U.S. 631 (1947):

> where several acts are pleaded in a single count and submitted to the jury, under instructions which allow a verdict of guilty on any one or more of such acts, a reviewing court has no way of knowing that any wrongly submitted act was not the one convicted upon.

Id. at 641 n.1. Thus, in *Chiarella* v. *United States*, 445 U.S. 222 (1980), this Court held that a conviction must be reversed where the jury was instructed that it could convict on either a valid or invalid theory, stating: "We may not uphold a criminal conviction if it is impossible to *ascertain* whether the defendant has been punished for noncriminal conduct." *Id.* at 237 n.21 (citations omitted) (emphasis supplied). Similarly, *Yates* v. *United States*, 354 U.S. 298 (1957), *overruled on other grounds*, 437 U.S. 1 (1978), held that a verdict must "be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." 354 U.S. at 312 (citations omitted).

In short, *Stromberg* teaches that "[c]riminal sanctions cannot rest on what an appellate court *thinks* the jury would have done had the issues put to it been framed differently." *United States* v. *Carman*, 577 F.2d 556, 568 (9th Cir. 1978) (emphasis supplied). "It is a sound and well justified rule of appellate law that a reviewing court must not speculate on the decision-making process of the jury." *Wicks* v. *Lockhart*, 560 F. Supp. 549, 565 (E.D. Ark. 1983). "Just as a proper verdict cannot be upset by speculation [or] inquiry into how the jury arrived at its

decision, . . . an improper verdict cannot be cured by employing the same speculation." *Id.* (citations omitted). The decision of the court of appeals in this case is thus directly contrary to *Stromberg*.[12]

The court of appeals' decision not only ignored *Stromberg*, but it directly conflicts with the decisions of every other circuit that has considered the issue. Prior to this

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[12] The court of appeals' decision is also inconsistent with the principle of *Street* v. *New York*, 394 U.S. 576, 588-90 (1969). *See also, e.g., Eaton* v. *City of Tulsa*, 415 U.S. 697, 699 & note (1974). In *Street* this Court held that a guilty verdict in a *bench* trial based on a statute with alternative clauses, one of which is unconstitutional, must be reversed "unless the record *negates the possibility*" that the conviction was based on the invalid ground. 394 U.S. at 588 (emphasis supplied).

Since *Street* was a bench trial, it involved considerations far different from those applicable to review of a general jury verdict. Thus, it is not at all clear that a similar review of the record is appropriate here. Even if it were, the standard used by the court of appeals in this case is a far cry from the *Street* standard. For example, the court inquired whether the record "*support[ed] an inference* that the jury acted pursuant to" the erroneous instruction, App. 9a (emphasis supplied); whether the jury "*may*" have convicted on the erroneous theory, App. 17a (emphasis supplied); whether the jury was "*unlikely*" to have convicted on the erroneous theory, App. 19a (emphasis supplied); whether the court "believed there was a *substantial possibility* that the jury convicted on an improper legal theory," App. 27a (emphasis supplied); and whether "a conscientious juror . . . would have *hesitated to convict*" under the erroneous theory, App. 22a (emphasis supplied).

Contrary to the rule of *Street*, the court of appeals did not determine whether the record "*negate[d] the possibility*" that the jury acted on the invalid theory. It did the opposite. It parsed the record for evidence that the jury based its verdict on the invalid theory. But, since a reviewing court has no way of knowing the basis of a general jury verdict, it was hardly surprising that the court concluded that the record did "not support an inference that the jury acted pursuant to" the erroneous instruction. App. 9a. Thus, the court of appeals stood the *Street* standard on its head. Under *Street*, the test is whether the record proves conclusively that the trier of fact did *not* act on the invalid theory, not whether the record demonstrates that it did.

decision eight circuits have ruled that where a case is submitted to the jury on alternative legal theories, one of which is invalid, a general verdict of guilty must be vacated. *See, e.g., United States* v. *Moynagh*, 566 F.2d 799, 804 (1st Cir. 1977), *cert. denied*, 435 U.S. 917 (1978); *United States* v. *Brecht*, 540 F.2d 45, 50-51 n.10 (2d Cir. 1976), *cert. denied*, 429 U.S. 1123 (1977); *United States* v. *Dansker*, 537 F.2d 40, 51 (3d Cir. 1976), *cert. denied*, 423 U.S. 1038 (1977); *United States* v. *Head*, 641 F.2d 174, 178-79 (4th Cir. 1981); *Cameron* v. *Hauck*, 383 F.2d 966, 973 (5th Cir. 1967), *cert. denied*, 389 U.S. 1039 (1968); *Cramer* v. *Fahner*, 683 F.2d 1376, 1379-80 (7th Cir.), *cert. denied*, 103 S. Ct. 376 (1982); *United States* v. *Williams*, 464 F.2d 927, 931 (8th Cir. 1972); *Beck* v. *United States*, 298 F.2d 622, 631 (9th Cir.), *cert. denied*, 370 U.S. 919 (1962); *Samuel* v. *United States*, 169 F.2d 787, 795-98 (9th Cir. 1948); *United States* v. *Irwin*, 654 F.2d 671, 680 (10th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982).[14]

As the Third Circuit has explained, any attempt to look into the minds of jurors to divine the basis of a general verdict is forbidden by *Stromberg*. "When it is improper to submit a case on one of two alternative theories, a new trial must be granted . . . ." *Government of the Virgin Islands* v. *Richards*, 618 F.2d 242, 244 (3d Cir. 1980).

The wisdom of the *Stromberg* rule is nowhere better demonstrated than in the court of appeals' unpersuasive attempt to explain how it could determine that it was "unlikely" that the jury convicted petitioners on the erroneous theory.[15] The court sought to minimize the jury's ex-

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[14] Likewise, in other instances the D.C. Circuit has followed *Stromberg*. *See, e.g., United States* v. *Cox*, 432 F.2d 1326, 1327 (D.C. Cir. 1970).

[15] The cases cited by the court of appeals in support of its decision are *United States* v. *Herbert*, 698 F.2d 981 (9th Cir.), *cert. denied*, 104 S. Ct. 87 (1983); *United States* v. *Brooklier*, 685

posure to the invalid theory, saying that the jury "heard a snippet of the invalid theory at the beginning [and] a paragraph or two in an eighty-six page charge at the end . . . ." App. 33a. This characterization ignores the fact that the erroneous instruction was the only instruction on the elements of wire fraud, and, even more importantly, that the jury was *reinstructed* on the erroneous theory during its deliberations. *See supra*, p. 8. In the reinstruction, never mentioned in the court's opinion, the invalid theory was not buried in an eighty-six page charge. It stood out in a short, succinct statement of the elements of the offense. Any possibility that the invalid charge to the jury was cured by other instructions is destroyed by this reinstruction. Where a supplemental instruction is in question, "the error is not cured by a prior unexceptional and unilluminating abstract charge." *Bollenbach* v. *United States*, 326 U.S. 607, 612 (1946). *See also, e.g.*, *United States* v. *Adamson*, 700 F.2d 953, 966-67 (5th Cir. Unit B), *cert. denied*, 104 S. Ct. 116 (1983).

Moreover, the court's characterization ignores the fact that the prosecutors argued to the district court that it was "absolutely crucial" that the erroneous theory be incorporated in the instructions. The prosecutors, with a first-hand feel for the dynamics of the trial, the impact of the witnesses, and the weight of the evidence, would not have asked for this "crucial" instruction if there was no chance the jury would act upon it.

The court of appeals also mistakenly cites the jury's general verdicts on count two of the indictment, transportation of the proceeds of the fraud in foreign commerce in violation of 18 U.S.C. § 2314, as a basis for

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F.2d 1206 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 1194 (1983); *United States* v. *Pino*, 609 F.2d 106 (3d Cir. 1979); and *Alexander* v. *United States*, 418 F.2d 1203 (D.C. Cir. 1969). These cases are inapposite. In none of them was the jury instructed on the basis of alternative theories, one of which was legally invalid. Consequently, the *Stromberg* issue never arose.

affirming the wire fraud convictions. App. 25a-26a. Count two charged the defendants with transferring a $775,008 check "knowing the same to have been taken by fraud" as alleged in the wire fraud counts and incorporated by reference in count two. If the jury found a fraud under either the valid or the invalid theory set forth in count one, any money received by Interconex, whether as a result of economic harm to Raytheon or as a remuneration for the transportation services it provided, would have been "taken by fraud." Thus, the convictions on this count provide no insight into the jury's general verdict.[16]

In sum, as this Court has consistently recognized since *Stromberg*, where both valid and invalid theories are submitted to a jury and that jury returns a general verdict of guilty, it is impossible for a reviewing court to ascertain which theory the jury acted upon. The court of appeals' attempt to do just that sets a new and radical precedent for appellate speculation as to the basis of general jury verdicts. This evisceration of the *Stromberg* rule merits review by this Court.

II. THE PROCEDURES FOLLOWED IN REQUIRING PETITIONERS STEPHENS AND ACHUCK TO PAY RESTITUTION OF $1.75 MILLION VIOLATED THEIR RIGHT TO DUE PROCESS OF LAW

In addition to concurrent five-year prison terms, the district court required Stephens to pay $1 million to Raytheon in restitution as a condition of probating a con-

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[16] Reversal of the wire fraud convictions would require reversal of the conspiracy and interstate transportation convictions. The fraud underlying the 18 U.S.C. § 2314 conviction for transporting the proceeds of fraud in interstate for foreign commerce was based on the wire fraud, which, as demonstrated above, may have rested on an invalid legal theory. The conspiracy count, since it too may have rested on the improper wire fraud theory, must also be reversed. *See, e.g., United States* v. *Carman*, 577 F.2d 556, 567-68 (9th Cir. 1978).

secutive five-year sentence. Achuck was placed on probation on condition that he make restitution to Raytheon in the amount of $750,000. The court imposed the restitution orders under 18 U.S.C. § 3651 which provides that as a condition of probation, a defendant may "be required to make restitution or reparation to aggrieved parties for *actual damages or loss* caused by the offense for which conviction was had . . . ." (emphasis supplied).

As discussed above, it was impossible to determine from the jury's general verdict how it resolved the close and hotly contested factual question of economic harm to Raytheon. *See supra*, pp. 13-15. Of course, the amount of any damages was not an issue at trial and, obviously, the jury's verdict provided no guidance on that question. Before ordering Stephens and Achuck to pay restitution of $1.75 million, the trial court conducted no hearings on the question whether, or to what extent, Raytheon suffered economic damage. As the court of appeals observed, the district court made no findings of fact and provided no explanation for its restitution orders. App. 48a-49a.

Nevertheless, the court of appeals, relying upon the trial court's "wide discretion in sentencing," App. 46a, and what it characterized as "the state's important interests in rehabilitation and justice that are furthered by restitution," App. 47a, affirmed the restitution orders.[17]

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[17] The court of appeals cited *United States* v. *Johnson*, 700 F.2d 699 (11th Cir. 1983); *United States* v. *Lynch*, 699 F.2d 839 (7th Cir. 1982); *United States* v. *Brown*, 699 F.2d 704 (5th Cir. 1983); and *United States* v. *Roberts*, 619 F.2d 1 (7th Cir. 1979), for the sweeping proposition that after conviction, the trial court could "order restitution for the amount of loss she finds the criminal violation caused." App. 49a (footnote omitted). Those cases do not establish any such far-reaching power in the trial court. In both *Johnson* and *Brown*, the court of appeals remanded because it could not determine the basis for the district court's restitution orders. In *Lynch* the defendant was convicted of improperly obtaining reductions in property tax assessments. The "government showed the

This ruling ignores the fact that such awards are not statutory fines, which may be imposed as part of the regular criminal sentencing process, but are rather monetary compensation assessed to make whole the victim of criminal conduct. Accordingly, procedural safeguards must govern such awards to insure that they do not exceed compensation for actual economic loss suffered.

The decision below expands enormously the power of trial courts to impose economic judgments upon defendants in the form of restitution awards without the constitutionally mandated procedural safeguards of the Due Process Clause and the Seventh Amendment right to a jury trial. Review of this decision is important because it comes at a time when restitution has become an increasingly popular part of the sentencing process. This has resulted in new legislation both at the state and federal levels. *See, e.g.*, Victim and Witness Protection Act of 1982, § 5, 18 U.S.C.A. §§ 3579-80 (West Supp. 1982) (applicable to crimes committed after January 1, 1983); Ga. Code Ann. § 17-14-1 to 14-16 (1982).[18] Despite the new emphasis on restitution, Congress nevertheless recognized

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County lost over $1.4 million in property tax revenues. The defendant [did] not challenge that contention." 699 F.2d at 345-46. The defendant was required to pay restitution of $100,000. In that case, unlike this one, there was no dispute that the purported victim lost far more as a result of the defendant's criminal conduct than the defendant was required to pay in restitution.

In *Roberts*, the "proof at trial was that the defendant defrauded customers of $1.7 million. Approximately $850,000 was recovered from the defendant," and the trial judge "credited defendant with $100,000 which he had invested in the scheme himself, leaving $750,000 due and owing to his victims." 619 F.2d at 2. Thus, there was a firm basis for the trial court to require restitution in the amount of $750,000.

[18] For a description of several state restitution programs, see Chesney, Hudson & McLagen, "A New Look at Restitution: Recent Legislation, Programs and Research," 61 JUDICATURE 348 (1978).

that in ordering restitution the courts must be attentive to avoid "infringing on the constitutional rights of the defendant." Victim and Witness Protection Act of 1982, § 2(b)(2), *reprinted in* 18 U.S.C.A. § 1512 note (West Supp. 1982).

Despite the broad, and virtually unreviewable, sentencing power of the trial court, prior to the decision below, appellate courts carefully limited the power of sentencing courts to order restitution. Thus, as the court of appeals for the Ninth Circuit recently stated, the "actual damages" requirement under § 3651 requires that

> the amount of loss must be established by proof at trial, *United States* v. *Stoehr*, 196 F.2d 276 (3d Cir. 1952); *Roberts*, 619 F.2d at 2, some other judicial determination, *see Boswell*, 565 F.2d at 1342-43; *Taylor*, 305 F.2d at 187, or some consensual means, *Phillips*, 679 F.2d at 194; *United States* v. *Landay*, 513 F.2d 306 (5th Cir. 1975).

United States v. *Gering*, 716 F.2d 615, 625 (9th Cir. 1983.)

A number of courts have framed restitution awards so as not to deprive criminal defendants of procedural and substantive rights they would have had in civil proceedings. For instance, following a criminal tax conviction a court may not, as a condition of probation, order a defendant to pay an amount in taxes unless that amount has been conceded by the defendant, conclusively established in the criminal procedure, or determined in the civil tax proceeding. *United States* v. *Franks*, Nos. 81-2309 and 81-2310 (10th Cir. December 27, 1983).[19] In *United States* v. *Barringer*, 712 F.2d 60 (4th Cir. 1983), a de-

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[19] *See also United States* v. *Touchet*, 658 F.2d 1074, 1076 (5th Cir. 1981); *United States* v. *Weber*, 437 F.2d 1218, 1219 (7th Cir. 1971); *United States* v. *Taylor*, 305 F.2d 183, 187 (4th Cir.), *cert. denied*, 371 U.S. 894 (1962); *United States* v. *Stoehr*, 196 F.2d 276, 284 (3d Cir.), *cert. denied*, 344 U.S. 836 (1952).

fendant was required, as a condition of probation, to establish a trust fund that could be used to satisfy any judgment obtained against him in related civil litigation. In *United States* v. *Tiler*, 602 F.2d 30 (2d Cir. 1979), the defendants were required to deposit $100,000 in escrow to secure payment of damages to be determined through the regular process of the Customs Service.

These cases, which enforce the strict limitations found in § 3651, recognize the fundamental unfairness of using probation as a means of collecting damages not yet finally determined in a civil proceeding. As the Second Circuit said in *Tiler*, "generally restitution payments have been ordered only after actual damages have either been finally determined or formally conceded. *See, e.g., United States* v. *Boswell, supra*; *United States* v. *Hoffman*, 415 F.2d 14, 22-23 (7th Cir.), *cert. denied*, 396 U.S. 958, 90 S. Ct. 431, 42 L. Ed.2d 423 (1969)." 602 F.2d at 34.

These limitations were ignored by the court below. Stephens and Achuck never had the opportunity to litigate the extent, if any, of actual damages suffered by Raytheon.[20] They have been thus denied the fundamental

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[20] The court of appeals found that the record was "sufficiently clear for us to competently determine that the" amount of restitution ordered was proper. App. 49a. It asserted that because Raytheon lost $600,000 to $900,000 per voyage for each of three voyages and because approximately $2.1 million was transferred to Generation Holdings, the district court could have awarded restitution in the amount that it did. Such a conclusion, however, requires a series of determinations that the jury was not required to make and neither the district court nor the court of appeals made. For instance, to reach that conclusion one has to resolve the conflicting evidence whether Raytheon's agreement with Waterman, at a rate of $164 a ton, would have applied if Raytheon had provided the transportation, as well as whether that agreement prohibited Raytheon from chartering a vessel. To conclude that Raytheon was free to charter a vessel, one must have determined that, despite its lack of experience in chartering, it could have done so as cheaply as Interocean, which was in the freight-forwarding business. Finally, a determina-

due process right of an opportunity to be heard.[21]

The lack of procedural safeguards in the restitution provisions of the Victim and Witness Protection Act led one district court to hold those provisions unconstitutional. In *United States* v. *Welden*, 568 F. Supp. 516 (N.D. Ala. 1983), *appeal docketed*, No. 83-7444 (11th Cir. August 18, 1983), the court found that the restitution provisions did not satisfy the minimum standards of the Due Process Clause or the Seventh Amendment because the defendant was not entitled to a full hearing or a jury trial before being ordered to pay restitution.[22] The same considerations that led the *Welden* court to declare the Victim and Witness Protection Act unconstitutional compel a conclusion that the procedures below did not satisfy minimum constitutional guarantees. Not only were Achuck and Stephens not afforded a jury

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tion would have to be made as to whether Raytheon was damaged at all in light of the fact that in the competitive bidding, the IMS-Interconex bid offered the lowest rate. Not a single one of these issues was determined by the jury's verdict or addressed by either court below. Moreover, at no time in the proceedings below was either the measure, or extent of, damages even at issue.

[21] The district court refused to adopt a procedure similar to that followed in *Franks*, *Barringer* and *Tiler*, even though it was specifically pointed out that Raytheon had instituted civil litigation against Stephens and Achuck in the Supreme Court of Bermuda seeking restitution. *Raytheon Company* v. *Carver, et al.*, Supreme Court of Bermuda, No. 82-63.

[22] Section 3580(a), 18 U.S.C.A., states:

> (d) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant and such defendant's dependents shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

trial on the issue of damages, but they were afforded no right to a hearing on damages.

Review of the court of appeals' decision is warranted not only because of the effect on Stephens and Achuck, but more importantly, because of the precedent it establishes in creating almost limitless power in trial courts to impose huge restitution orders as a condition of probation without the procedural safeguards that due process demands.

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-2492

UNITED STATES OF AMERICA

v.

JOSEPH C. LEMIRE,
Appellant

No. 82-2493

UNITED STATES OF AMERICA

v.

JON T. STEPHENS,
Appellant

No. 82-2526

UNITED STATES OF AMERICA

v.

LIONEL W. ACHUCK,
Appellant

No. 82-2528

UNITED STATES OF AMERICA

v.

INTERCONEX, INC.,

Appellant

Appeals from the United States District Court
for the District of Columbia

(D.C. Criminal Nos. 81-00342-02, 81-00342-04,
81-00342-03 and 81-00342-05)

Argued September 9, 1983

Decided November 4, 1983

John W. Vardaman, Jr., and *Robert Gold* with whom *David E. Kendall*, *Jon T. Brown* and *James T. Reilly* were on the brief for appellants.

William C. Bryson, Attorney, Department of Justice, with whom *Stanley S. Harris*, United States Attorney, was on the brief for appellee.

Before: WRIGHT, WALD and EDWARDS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WALD.

WALD, *Circuit Judge*: These appeals are from the convictions of three individual defendants and a corporation on four counts of wire fraud, in violation of 18 U.S.C. § 1343 (1976), one count of transportation of the proceeds of fraud in interstate commerce, in violation of 18 U.S.C. § 2314 (1976), and one count of conspiracy, in violation of 18 U.S.C. § 371 (1976). The district court sentenced defendant Stephens to five concurrent five year

prison terms and a suspended consecutive five year term, the suspension being conditioned on payment of $1 million restitution to Raytheon Company. It sentenced defendant Achuck to six suspended concurrent five year prison terms, suspension being conditioned on payment of $750,000 restitution to Raytheon. Defendant Lemire received six concurrent five year sentences. The three individual defendants were also fined $19,000 each, and defendant Interconex, Inc., was fined $24,000.

All four defendants challenge their convictions on the following grounds: (1) the district court misinstructed the jury on the requisite elements of wire fraud; (2) the instructions allowed the jury to convict on a theory of fraud different from that which the government presented at trial; (3) the district court erred in permitting the government's use of a non-expert summary witness; and (4) the district court erred in not admitting three defense exhibits into evidence. In addition, Achuck challenges the sufficiency of the evidence to uphold his conviction. Finally, both Achuck and Stephens challenge the district court's authority to set restitution as a condition of probation in this case. For the following reasons, we affirm the convictions and restitution conditions.

I. Background

The evidence in this case is both complex and controverted, but certain uncontested facts set the stage for analyzing the defendants' appeals.

A. *The Uncontested Facts*

On June 16, 1976, the Raytheon Company contracted with the Kingdom of Saudi Arabia to construct a complex missile system and military base. As part of that project, Raytheon decided to provide housing for its personnel in Saudi Arabia. At the time Raytheon entered this contract, and throughout the period involved in this case, Ray Carver was the program manager for the entire

project, and Raytheon's senior official in Saudi Arabia. Carver was involved in the alleged fraud and conspiracy but is not an appellant in this case. Defendant Joseph Lemire was the manager of several supporting subsidiaries of Raytheon and was responsible for procuring and shipping this housing to Saudi Arabia.

Prior to Raytheon entering the 1976 contract, Lemire and Carver became acquainted with defendants Jon Stephens and Lionel Achuck, who are co-owners of defendant Interconex, an international freight forwarder.[1] Interconex had handled some of Raytheon's previous shipping to Saudi Arabia. When Lemire began to seek bids for the housing project, however, Interconex no longer provided any shipping for Raytheon because Raytheon had entered an agreement with Waterman Steamship Line to handle its shipping needs.

At the time the alleged fraud occurred, Raytheon had a company-wide policy prohibiting employees from accepting anything of value from any organization that sought to or did provide goods or services for Raytheon. Every year, Lemire signed a card representing that he had complied with the conflict of interest policy. The policy also required Lemire to report any conflict of interest that arose after the card with signed. In addition, Raytheon had another company policy requiring that all companies making competing bids for contracts to provide Raytheon with goods or services be given the same bidding information at the same time.

In late May of 1976, Lemire had his staff member, Mr. Waxman, contact International Modular Systems, Ltd. (IMS), a District of Columbia company that produces modular homes. On June 7, Stephens met with the repre-

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[1] A freight forwarder is a commissioned agent that books shipments with common carriers for ocean freight transportation. It may also charter space on a vessel or charter an entire vessel for a particular customer.

sentatives of IMS to discuss their provision of houses to Saudi Arabia and, as a result of the meeting, Interconex and IMS signed an agreement that they would work together to get the Raytheon contract and to develop other business. That agreement provided that IMS would bid on the Raytheon contract, and, if successful, IMS would manufacture and deliver the prefabricated construction to port, and Interconex would ship and deliver the construction to the site in Saudi Arabia. On June 9, Lemire spoke to IMS on the telephone and discussed modular housing for Saudi Arabia. On June 21, Mr. Waxman notified modular house manufacturers, including IMS, of the contract specifications; he told them that the bids were to include shipping and that the bids were due by June 23. Raytheon received four bids, of which the IMS bid was lowest. The bids differed greatly in their shipping charges, with IMS charging the least amount—in this case, $91.11 per ton.[2] Lemire awarded the contract to IMS.

When the housing contract was let, Lemire informed the Raytheon official responsible for approving procurement contracts that he had solicited bids C&F (cost and freight), that is, for both the housing and transportation. When questioned about his decision to have the manufacturers provide shipping, Lemire responded that the competitive bid for shipping would save Raytheon money. Raytheon's management then approved the contract.

During this time, Achuck and Stephens made contractual arrangements allowing them to transfer funds into Winhall Insurance Company, a Bermuda based company in which each had a one-half interest. On June 10,

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[2] The shipping rates in the other bids were $115.07 per ton by Bendix, and $125.39 per ton by Atlantic International. Westyield Company also included a bid based on the $20.50 per cubic foot price quoted it by Interconex, but it bid on only part of the contract, and apparently its houses were too small for Raytheon's needs.

they travelled to Geneva where Achuck obtained special power of attorney over a Liberian company, Generation Holding (GH), and Stephens obtained a similar power over Coralda Trust, Ltd., a company based in Lichtenstein. When IMS was awarded the Raytheon contract, it entered into a subcontract agreement with Interconex. Rather than have IMS pay Interconex the full $20.50 per square foot that the companies had agreed upon, IMS consented to pay $12.65 per square foot to Interconex and the remaining $7.85 per square foot to GH. When IMS was later awarded a second contract by Raytheon, it paid the same rate to Interconex, but paid $9.35 per square foot to GH. GH later funneled money to Coralda Trust which then transferred some of the funds to Winhall. In other transactions, GH transferred funds that ultimately ended up in a Cayman Island company owned by Carver and Lemire.

In the fall of 1976, Raytheon began an investigation of the IMS contracts, and in particular the shipping rates. In the course of this investigation, a company official asked Lemire about who arranged the shipping for IMS and Lemire responded that he did not know. Raytheon also asked IMS and Interconex for cost information about the shipping, and both refused to supply the information.[8] Later in the fall, Raytheon got Interconex to cancel the fourth and final voyage upon which houses were being shipped. Raytheon itself chartered a boat to ship the houses, thereby achieving about $700,000 savings on the last trip. Tr. at 1148. Except for obtaining Interconex's release from the shipping contract for the fourth voyage and arranging shipping for the houses itself, Raytheon took no further action. The government investigation leading to the indictment was prompted by surveillance of Mrs. Carver by a member of the Saudi Royal family.

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[8] Interconex maintained that Raytheon had no right to know its costs since the contract was for a fixed rate. Interconex also persuaded IMS not to reveal the information for the same reason.

The grand jury indicted the defendants and Mr. Carver on September 11, 1981.[4]

B. *The Parties' Theories of the Case*

At trial, the government focused its proof primarily on its allegation that Interconex overcharged Raytheon for shipping. The government's theory was that Interconex was able to submit a lower bid than its competitors because of contract specification information that Lemire provided it well in advance of the bidding.[5] This information enabled Interconex to calculate its rate based on knowledge that it could charter an entire vessel to ship the housing, rather than booking shipments with a common carrier. The government contended that this knowledge allowed Interconex to achieve inflated profits while still submitting the lowest bid. These express profits were then divided among Carver, Lemire, Stephens and Achuck. It also argued that even if Interconex's shipping rate was not inflated in comparison to other bids and the Waterman Steamship rate, the scheme prevented Raytheon from saving money by chartering a boat itself, for the first three voyages. The government claims that Raytheon's agreement with Waterman was not an exclusive contract and covered small shipments only; thus it did not preclude Raytheon from chartering its own boat.

The defense denied that Lemire gave Interconex any advance information. It claimed that had Lemire not included shipping as part of the contract, Raytheon would have paid $164.50 per ton for shipping at the Waterman rate. Thus, Lemire was acting in Raytheon's best interest in including the shipping as part of the housing

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[4] The case against Carver was severed from this case on the government's motion, and Carver later pleaded guilty.

[5] The government argued at trial that Lemire provided information about the contract specifications to IMS during the June 9th conversation. The defense contended that the discussion focused generally on housing for Saudi Arabia, but did not reveal any contract specifications.

contract and in awarding the contract to IMS. Moreover, the defense argued that Lemire did not deny Raytheon the opportunity to charter its own boat. Lemire testified that he would never have considered chartering a vessel because he was not free to make such arrangements, believing he had to use Waterman. He pointed out that Raytheon had never before chartered its own boat.

The defense explained the transfer of funds from GH to Carver and Lemire as independent of the award of the IMS contract. Lemire testified that he did not know that GH was the source of the funds, and in fact that he did not know of GH's existence until the government investigation preceding the indictment. The defense contended that the funds were Stephen's and Achuck's capital investment for an independent joint venture by Carver, Lemire, Stephens and Achuck to build a modular housing factory in Saudi Arabia. Thus, Lemire denies having gotten a kickback from Interconex for aiding them in getting the shipping contract.

II. Instructions on Wire Fraud

The defendants contend on appeal that the instructions to the jury incorrectly stated the law on the essential elements of wire fraud. They assert that the instructions erroneously allowed the jury to convict based on a theory that Lemire's and Carver's failures to disclose their conflicts of interest due to their alleged joint venture with Stephens and Achuck, without more, constituted a material non-disclosure evidencing a specific intent to defraud Raytheon. The government responds that the instructions were entirely correct, *i.e.*, that a failure to disclose a conflict of interest, when accompanied by a specific intent to defraud the employer of the undisputed loyalty of his employees, is sufficient to support a wire fraud conviction. Thus, it claims that even under the defendants' version of the facts, the jury could have convicted the defendants for defrauding Raytheon of the

loyal and honest services of its employees Lemire and Carver. Although we agree with the defendants that the government's interpretation of the wire fraud statute encompasses too much, we find that a fair reading of the instructions in light of the evidence and arguments the jury heard, does not support an inference that the jury acted pursuant to such an impermissibly broad interpretation of the statute.

A. *The Scope of Criminal Fraud*

The elements of wire fraud are (1) formation of a "scheme to defraud,"[6] and (2) use of interstate wire communication to further that scheme.[7] *See United States* v. *Pollack*, 534 F.2d 964, 971 (D.C. Cir.), *cert. denied*, 429 U.S. 924 (1976); *cf. Pereira* v. *United States*, 347 U.S. 1, 8 (1954) (elements of mail fraud); *United States* v. *Diggs*, 613 F.2d 988, 997 (D.C. Cir. 1979) (same); *United States* v. *George*, 477 F.2d 508, 511 (7th Cir.) (same), *cert. denied*, 414 U.S. 827 (1973). Congress did not define "scheme or artifice to defraud" when it first coined that phrase, nor has it since. *See United*

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[6] The requisite elements of "scheme to defraud" under the wire fraud statute, 18 U.S.C. § 1343 and the mail fraud statute, 18 U.S.C. § 1341, are identical. Thus, cases construing mail fraud apply to the wire fraud statute as well. *See* United States v. Feldman, 711 F.2d 758, 763 n.1 (7th Cir. 1983); United States v. Computer Sciences Corp., 689 F.2d 1181, 1188 n.14 (4th Cir. 1982), *cert. denied*, —— U.S. ——, 103 S.Ct. 729 (1983); United States v. Giovengo, 637 F.2d 941, 944 (3d Cir. 1980), *cert. denied*, 450 U.S. 1032 (1981).

[7] 18 U.S.C. § 1343 provides:

> Whoever, having devised or intended to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years or both.

States v. *Reid*, 533 F.2d 1255, 1264 (D.C. Cir. 1976); *United States* v. *Von Barta*, 635 F.2d 999, 1005 (2d Cir. 1980), *cert. denied*, 450 U.S. 998 (1981).[8] Instead that expression has taken on its present meaning from 111 years of case law.[9] *See Von Barta*, 635 F.2d at 1005 (legislative history helpful), *United States* v. *McNeive*, 536 F.2d 1245, 1247 n.3 (8th Cir. 1976) (same).

At the core of the judicially defined "scheme to defraud" is the notion of a trust owed to another and a subsequent breach of that trust. But "[n]ot every breach of a fiduciary duty works a criminal fraud." *George*, 477 F.2d at 508. In their attempts to delineate which breaches of duty rise to the level of criminal fraud, courts have used various limiting doctrines. Some, including this court, have required that the fraud be "active"—that the fiduciary utilize his trusted position to obtain a benefit for himself at the expense of the person whose trust he breaches. *See Post* v. *United States*, 407 F.2d 319, 329 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1092, 1969); *United States* v. *Epstein*, 174 F.2d 754, 766 (6th Cir. 1949). Other courts have required that the breach be accompanied by some material non-disclosure or misrepresentation to the party owed the duty. *See, e.g., United States* v. *Ballard*, 663 F.2d 534 (5th Cir. Unit B 1981), *modified in part and reh'g denied*, 680 F.2d 352 (5th Cir. Unit B 1982); *Von Barta*, 635 F.2d at 1006. The crux of these require-

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[8] In *Reid*, we quoted with approval the Fifth Circuit's comment that "[t]he law does not define fraud; it needs no definition; it is as old as falsehood and as versable [sic] as human ingenuity." Weiss v. United States, 122 F.2d 675, 681 (5th Cir. 1941). The government's expansive interpretation in this and other recent mail and wire fraud cases, *see, e.g.*, United States v. Feldman, 711 F.2d at 764; *Von Barta*, 635 F.2d at 1003, gives us second thoughts.

[9] The phrase was first used in the mail fraud statute of 1872. Ch. 335, § 301, 17 Stat. 323. *See* Comment, *The Intangible-Rights Doctrine and Political Corruption Prosecutions Under the Federal Mail Fraud Statute*, 47 U. Chi. L. Rev. 562, 567 (1980).

ments is that the wire fraud statute makes criminal only breaches of duty that are accompanied by a misrepresentation or non-disclosure that is intended or is contemplated to deprive the person to whom the duty is owed of some legally significant benefit. *See Diggs*, 613 F.2d at 997 ("proof of fraudulent intent is critical"); *Ballard*, 663 F.2d at 541 n.17 (relating materiality to active fraud).

Although critical ambiguities about the scope of the wire fraud statute remain, there is judicial consensus about certain requisite elements of a scheme to defraud. The duty breached need not arise from state or federal law; in particular, it may stem from an employment relationship of the sort that imposes discretion and consequently obligations of loyalty and fidelity on the employee. *See, e.g., Ballard*, 663 F.2d at 541; *Von Barta*, 635 F.2d at 999; *United States* v. *Bohonus*, 628 F.2d 1167, 1172 (9th Cir.), *cert. denied*, 447 U.S. 928 (1980); *United States* v. *Reece*, 614 F.2d 1259, 1261 (10th Cir. 1980); *United States* v. *Bryza*, 522 F.2d 414, 422 (7th Cir. 1975), *cert. denied*, 426 U.S. 912 (1976). And although the scheme to defraud must threaten some cognizable harm to its target, that harm need not be a deprivation of tangible property or money; criminal fraud encompasses schemes to defraud persons of significant intangibles as well. *See, e.g., United States* v. *Condolon*, 600 F.2d 7, 8 (7th Cir. 1979) (scheme to obtain sexual favors by false promises of modelling or acting job); *United States* v. *Louderman*, 576 F.2d 1383, 1387-88 (9th Cir.) (scheme to invade privacy by obtaining confidential information from telephone company), *cert. denied*, 439 U.S. 896 (1978). With the broadening of the scope of the statute to cover intangible harms, however, has come a certain amount of confusion and controversy over the outer boundaries of wire fraud. In particular, premising a felony solely on a scheme to defraud an employer of the loyal services of his employee has spawned a fierce debate about potential over-criminalization of employer-

employee breakdowns, better handled in the civil courts.[10] Carried to its logical extreme, such a theory would criminalize any intentional undisclosed breach of duty to an employer. The government appears to be arguing just such a theory here, but we are not inclined to accept it for the following reasons.

An employer values the loyalty of his employees and prohibits conflicts of interest primarily because such conflicts create an incentive for the employee to act in a manner detrimental to the employer's tangible monetary interests. Employee loyalty is not an end in itself, it is a means to obtain and preserve pecuniary benefits for the

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[10] *See, e.g.*, Coffee, *The Metastasis of Mail Fraud: The Continuing Story of the "Evolution" of a White Collar Crime*, 21 Am. Crim. L. Rev. 1 (1983); Coffee, *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics*, 19 Am. Crim. L. Rev. 117 (1983) [hereinafter cited as Coffee, *From Tort to Crime*]; Hurson, *Limiting the Federal Mail Fraud Statute—A Legislative Approach*, 20 Am. Crim. L. Rev. 423 (1983); Comment, *supra* note 9.

In corporate law, the notion of what constitutes fraud on a company by a senior official as opposed to a mere conflict of interest, which may be approved in advance or even ratified in retrospect by the company's governing board, has changed considerably over the past several decades. *See* 3 Fletcher Cyclopedia Corporations § 917, at 371 (perm. ed. 1975). This is reflected in recent state laws, *see, e.g.*, Del. Code Ann. tit. 8, § 144(a) (1969) (no contract void or voidable if fair or if material facts of transaction revealed at time it is ratified); N.Y. Bus. Corp. Law § 713 (McKinney Supp. 1982) (same), and the Model Business Corporation Act § 41 (1979). In general, where an official of the corporation does not disclose his personal interest in a transaction the transaction is merely voidable and the company may choose to go ahead with the transaction as well as continue with the official's services, *see* 3 Fletcher Cyclopedia Corporations, *supra*, §§ 979, 981, at 496, 500, as long as the transaction is fair to the corporation. *Id.* § 919, at 377, 378. This reading of corporate law parallels the civil law's treatment of non-disclosure generally: non-disclosure is material only if it was reasonably likely to affect a party's judgment in a particular transaction. *See* Restatement (Second) Torts § 551(1); Restatement (Second) Contracts §§ 161, 162.

employer. An employee's undisclosed conflict of interest does not by itself necessarily pose the threat of economic harm to the employer. Therefore it does not alone constitute a sufficient indicium that the employee intended any criminally cognizable harm to the employer.[11] Other surrounding circumstances may of course provide the necessary proof that the employee intended such harm.[12] We hold today, however, that an intentional failure to disclose a conflict of interest, without more, is not sufficient evidence of the intent to defraud an employer necessary under the wire fraud statute.[13] *See United States* v. *Feldman*, 711 F.2d 758, 763 (7th Cir. 1983). There

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[11] "[I]f merely depriving the victim of the loyalty and faithful service of his fiduciary constitutes criminal fraud, the ends/means distinction is lost. Once the ends/means distinction is abolished and disloyalty alone becomes the crime, little remains before every civil wrong is potentially indictable." Coffee, *From Tort to Crime*, *supra* note 10, at 167. Other types of intangibles featured in wire fraud cases are not mere means to pecuniary ends. Thus, a scheme to deprive someone of privacy, *see Louderman*, 576 F.2d at 1387-88, or to gain sexual favors, *see Condolon*, 600 F.2d at 8, can sustain a finding of criminal intent because they involve intangibles recognized in law as having independent value to their owners. And, some intangibles like trade secrets, although a means to pecuniary ends, are so closely related to those ends that a scheme to deprive a victim of the intangible necessarily implies that the perpetrator contemplated pecuniary harm.

[12] "The requisite intent under the federal mail and wire fraud statutes may be inferred from the totality of circumstances and need not be proven by direct evidence." United States v. Alston, 609 F.2d 531, 538 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 918 (1980).

[13] Our holding does not address whether an undisclosed conflict of interest, by itself, can support the wire fraud conviction of a public official. Public officials may be held to a higher standard of public trust; and conflicts of interest may harm the public merely by giving the illusion of unfairness. *See Ballard*, 663 F.2d at 541 n.17; United States v. Dixon, 536 F.2d 1388, 1400 (2d Cir. 1976); *see also* United States v. Mandel, 591 F.2d 1347 (4th Cir.) (affirming conviction on theory independent of evidence of bribe) *rev'd on other grounds*, 602 F.2d 653 (4th Cir. 1979) (en banc), *cert. denied*, 445 U.S. 961 (1980).

must be a failure to disclose something which in the knowledge or contemplation of the employee poses an independent business risk to the employer. Other courts have so held. *Von Barta*, 635 F.2d at 1005 n.14; *United States* v. *Dixon*, 536 F.2d 1388, 1400-01 (2d Cir. 1976).

At the same time, we are not unaware that undisclosed conflicts of interest create fertile ground for subsequent misuse of the employee's position. "The vice against which [courts] seek to guard . . . is that the adverse interest of the individuals may overcome [their] duty [as] officials, and induce agreements and transactions detrimental to the [employer] and unduly beneficial to the individuals." *Epstein*, 174 F.2d at 764, (quoting *Wyman* v. *Bowman*, 127 F. 257, 273 (8th Cir. 1904)). Accordingly, our holding does not remove from the ambit of wire fraud undisclosed conflicts that, accompanied by activity on the part of the employee, carry a significant risk of identifiable harm to the employer apart from the loss of his employee's loyalty and fidelity. So long as the jury finds the non-disclosure furthers a scheme to abuse the trust of an employer in a manner that makes an identifiable harm to him, apart from the breach itself, reasonably foreseeable, it may convict the employee of wire fraud. The crucial determination must be whether the jury could infer that the defendant might reasonably have contemplated some concrete business harm to his employer stemming from his failure to disclose the conflict along with any other information relevant to the transaction. *See Von Barta*, 635 F.2d at 1005 n.14; *Dixon*, 536 F.2d at 1399 n.11.

Although this formulation may differ in some respects from that of other courts, we believe it only makes more explicit what they meant by a "material non-disclosure or misrepresentation."[14] The leading case defining "mate-

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[14] *See Ballard*, 663 F.2d at 541; *cf.* United States v. Bronston, 658 F.2d 920 (2d Cir. 1981) (upholding mail fraud conviction of a law firm partner who performed legal work for a company to help

rial non-disclosure" is *Ballard*, 663 F.2d 534, which involved a scheme to channel oil through a chain of oil companies in order to generate commissions. The scheme's mastermind, Mr. Granlund, was hired by the Florida Power Company to obtain oil during the 1973 oil shortage. The Florida Power Company paid him for this and also allowed him to receive commissions from the oil companies. By channelling the purchases through five companies, Granlund received five commissions on each sale; channelling in turn was arranged by giving kickbacks to employees of the intermediary companies responsible for purchases and sales of oil. The intermediaries were subject to price controls which limited the profit they could make on sales of oil. The *Ballard* court held that in light of these price controls the employees of the intermediaries did not intend to defraud their employers because the employers already received the maximum profits on each sale. The court reasoned that the failure of the employees to disclose the scheme to the intermediary employers would therefore not have altered their business conduct, so the non-disclosure was not material.[13]

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it obtain a city contract at the same time his firm was working to get the contract for a competitor), *cert. denied*, 456 U.S. 915 (1982); United States v. Newman, 664 F.2d 12 (2d Cir. 1981) (reversal of a dismissal of a mail fraud indictment of vestment banking firms' employees for insider trading on their own behalf based on confidential knowledge of impending corporate takeovers). While it is not at all clear, given the facts in these cases, that their results are inconsistent with our ruling, to the extent that their language or rationale cannot be squared with the holding in this case, we disagree with their analyses.

[13] The *Ballard* court rejected the argument that "the concealment by [an intermediary's employee] was material . . . because [the intermediary] might have desired to sell directly to FPC . . . to gain favor with that customer for the future." 663 F.2d at 541. By rejecting this argument, the court effectively asserted that general threats to business interests posed by employee conflicts of interest are too speculative to support a mail fraud conviction. The court demanded more specific evidence to back the government's conjecture that the employee conflict hurt the intermediary. *Id.*

In *Ballard*, the Fifth Circuit stated that a non-disclosure is material only if the employee "has reason to believe that the information would lead a reasonable employer to change its business conduct." 633 F.2d at 541; *see also Feldman*, 711 F.2d at 763 (simple concealment of conflict of interest in customer's accounts immaterial because it would not itself have enabled defendant to trade without advancing sufficient collateral); *United States* v. *Bethea*, 672 F.2d 407 (5th Cir. Unit B 1982) (procurement officer's ordering storage for servicemen who did not request it, thereby giving business to cosigner of defendant's loan, not fraud unless activities were not in furtherance of servicemen's best interest). Since an employer presumably would "change its business conduct" only if, upon disclosure of the conflict and any other relevant information, it saw new opportunities for profit or savings, or dangers of economic harm, the notion of materiality of non-disclosure or misrepresentation in the wire fraud context must logically focus on the reasonable foreseeability by the employee of potential economic harm to his employer stemming from the employer's ignorance of information relevant to the conflict.

B. *The Jury Instructions*

Under our standard for wire fraud, the jury would have had to find that the defendants' failure to disclose Lemire's and Carver's conflicts of interests were in furtherance of a scheme to defraud Raytheon of a business opportunity or economic benefit. If the jury believed the government's evidence that the defendants schemed to overcharge Raytheon for shipping in order to channel excess profits into their own venture, it could properly convict. The jury could also properly have found them guilty if it believed Lemire or Carver knew of Interconex's plan to charter an entire boat to ship the housing and did not inform Raytheon of this money-saving option, thereby depriving Raytheon of the opportunity to arrange its own shipping—assuming, of course, that Lemire did not sin-

cerely believe Raytheon could not charter a boat itself because of its Waterman commitment. Or, if the jury found that Lemire had solicited bids for modular housing C&F or had otherwise altered the standard procedure for letting the contract in order to enable Interconex to get the shipping contract to the detriment of Raytheon's best interests, then it might justifiably convict the defendants of wire fraud. If the jury, however, found only an undisclosed breath of fiduciary duty on Lemire's and Carver's part due to their interest in a joint venture with Interconex's principals, then it could not properly convict because there was nothing inherent in that failure to disclose that spelled business loss or harm to Raytheon.

We turn then to the trial judge's instructions to see if they could reasonably be interpreted by the jury to allow a conviction of wire fraud upon a mere finding of failure to disclose Lemire's and Carver's conflict of interest stemming from the joint venture. If in light of all the circumstances—the language of the instructions, the arguments of counsel, and the evidence itself—we find that the jury may have convicted the defendants solely upon that undisclosed conflict, those convictions must be reversed. *See, e.g., Ballard*, 663 F.2d at 544 (reversing and remanding because "the jury was authorized to find [defendant] guilty if the government made out facts supporting any of the criminal theories embodied in the [district] court's charge to them," including those rejected by the court of appeals). Alternatively, if these factors cumulatively indicate that it is highly improbable that the jury found the defendants guilty under an improper legal theory, technical errors in the instructions are deemed harmless, and we will affirm. *See Alexander* v. *United States*, 418 F.2d 1203 (D.C. Cir. 1969) (error in instructions harmless if all that happened at trial gave fair assurance that the jury was not substantially swayed by error); *United States* v. *Herbert*, 698 F.2d 981, 986-87 (9th Cir. 1983) (in light of evi-

dence, no reasonable possibility that error had materially affected verdict); *United States* v. *Brooklier*, 685 F.2d 1208 (2d Cir. 1982) (insufficient evidence of extortion meant that charge dealing with extortion on RICO count was erroneous, but error "harmless beyond reasonable doubt" since prosecutor told jury that defendants were not involved in the extortion and not to consider extortion in assessing guilt or innocence under RICO), *cert. denied*, —— U.S. ——, 103 S. Ct. 729 (1983); *United States* v. *Pine*, 609 F.2d 106, 108 (3d Cir. 1979) (proper test is to determine improper instructions' effect on jury's understanding of the law).[16]

The defendants mainly challenge the portions of the charge that address the legal requirements of a "scheme or artifice to defraud." In stating those requirements, the judge instructed:

> the first alleged object was to defraud Raytheon Company of its right to the honest, conscientious, faithful, loyal, disinterested and unbiased services,

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[16] The standard for determining when an error in a jury instruction requires reversal is the general standard for determining harmless error after objection by the defense. *See* Hamling v. United States, 418 U.S. 87, 108 (1973); *Alexander*, 418 F.2d at 1207; United States v. Valle-Valdez, 554 F.2d 911, 916 (9th Cir. 1977). Under that standard, "[i]t is our responsibility . . . to reverse appellant's conviction unless we can say 'with fair assurance after pondering all that happened without stripping the erroneous actions from the whole, that the judgment was not substantially swayed by the error.'" *Alexander*, 418 F.2d at 1207 (quoting Kotteakos v. United States, 328 U.S. 750, 765 (1946)). Although jury instructions addressing the elements of a crime are crucial, and errors in them have great potential for unfairness, we do not find that the possibly confusing nature of a small portion of the instructions in this case infected the trial with an unfairness that violates the defendants' rights to due process. Hence we do not consider whether the error was "harmless beyond reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967) (constitutional error requires reversal unless "harmless beyond a reasonable doubt").

> actions, and performances of duties by its employees Carver and Lemire, free from bribery, corruption, partiality, willful omission, bias, dishonesty, deceit, misconduct and fraud.
>
> . . . .
>
> Now the object of the scheme need not be money or any form of tangible property. The government need not prove any actual loss of money by the Raytheon Company.
>
> A scheme to defraud an employer of the honest, faithful and unbiased services of its employees can also come within the meaning of scheme or artifice to defraud as set forth in the wire fraud statute.

Tr. at 3175-76. By themselves, these words are ambiguous; conceivably they could be interpreted to allow a conviction solely on the basis of a knowing failure to disclose a conflict of interest, such as Lemire's interest in the joint venture with the principals of Interconex.

The remainder of the instructions, however, lead us to conclude that the jury was unlikely to have convicted for a mere failure to disclose such a conflict of interest. We must look at the jury instructions as a whole in assessing whether they constituted prejudicial error. *United States* v. *Park*, 421 U.S. 658, 674-75 (1975); *United States* v. *Baker*, 693 F.2d 183 (D.C. Cir. 1982); *Pollack*, 534 F.2d at 973; *United States* v. *Martin*, 475 F.2d 943, 947 (D.C. Cir. 1973).[17] The instructions immedi-

[17] For example, in *Pollack*, a mail fraud case, the instructions stated that if the "appellants were 'promoters of stock' . . . then [they] stood in a fiduciary relation to stockholders which required appellants to disclose fully all known facts that might influence prospective stockholders." 534 F.2d at 972-73. The appellants challenged the instruction both as permitting conviction solely for breach of fiduciary duty and because the prosecutor had not introduced any evidence that the defendants were promoters. We affirmed the conviction, however, because "throughout his charge to the jury, Judge Gasch reiterated that actual fraud, defined in terms

ately following the troublesome language confirmed the admonition that both a breach of fiduciary duty and material non-disclosure were required by the statute.[18]

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of specific intent and willfulness, was necessary to support a conviction." *Id.* at 978.

[18] The full charge relating to the meaning of "scheme or artifice to defraud" read:

> Now, the essential elements of the offense of wire fraud, each of which the government must prove beyond a reasonable doubt, are as follows:
>
> The first essential element: The government must prove that one or more of the defendants devised or intended to devise a scheme or artifice to defraud, specifically, a scheme or artifice with one or both of the two following objectives:
>
> Number one, the first alleged object was to defraud the Raytheon Company of its right to honest, conscientious, faithful, loyal, disinterested and unbiased services, actions, and performances of duties by its employees Carver and Lemire, free from bribery, corruption, partiality, willful omission, bias, dishonesty, deceit, misconduct and fraud.
>
> And the second object or the second alleged object of the scheme or artifice was to obtain money from the Raytheon Company by means of false pretenses and representations which defendants knew would be and were false when made.
>
> . . . .
>
> Now the words "scheme and artifice" as used in the wire fraud statute include any plan or course of action intended to deceive others and to obtain by false or fraudulent pretenses, representations or promises, money or property from persons so deceived.
>
> Although the government need not show that the alleged victims were in fact defrauded, the government must prove beyond a reasonable doubt that some actual harm or injury was at least contemplated.
>
> Now the object of the scheme need not be money or any form of tangible property. The government need not prove any actual loss of money by the Raytheon Company.
>
> A scheme to defraud an employer of the honest, faithful and unbiased services of its employees can also come within the meaning of scheme or artifice to defraud as set forth in the

The instructions were thus technically correct because they prefaced the non-disclosure requirement by the word "material," which under our legal standard requires that the employee reasonably contemplate the risk of some lost business opportunity or more direct pecuniary harm to the employer resulting from the non-disclosure. *See Bethea*, 672 F.2d at 414; *Ballard*, 663 F.2d at 541. Of course, as we noted at argument, one can hardly expect lay jurors to recognize nice legal concepts embedded in the definition of materiality,[19] especially when, as in this case, the lawyers and the court do not themselves agree on the precise content of that definition.[20] But there was an additional statement in the instructions that, "although the government need not show that the alleged victims were in fact defrauded, the government must prove beyond a reasonable doubt that some actual harm or injury was at least contemplated." Tr. at 2876. Although this statement may appear mainly to address the issue of whether the jury could convict even if it found the scheme was unsuccessful, *see United States* v. *Schaeffer*, 599 F.2d 678 (5th Cir. 1979) (refusing defendant's proposed instruction that the government must

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wire fraud statute. Breach of an employee's duty of loyalty to his employer does not, without more, violate the wire fraud statute. But such a breach by the employee can violate the wire fraud statute when, with specific intent to defraud, the employee also violates the employee's duty to disclose material information to his employer, or makes a material misrepresentation to or actively conceals material facts from the employer.

Tr. at 2174-77

[19] Generally the court must explain all terms of legal significance. United States v. Anderton, 629 F.2d 1044, 1049 & n.5 (5th Cir. 1980) ("agent" not self-defining). *See, e.g.*, Perry v. United States, 422 F.2d 697 (D.C. Cir. 1969) (instruction regarding use of "excessive force" in self-defense reversible error where it did not illumine boundary between reasonable and unreasonable force).

[20] At oral argument it became evident that the government, the defendants, and the panel all had different interpretations of *Ballard*'s materiality requirement.

show that someone was defrauded since success of scheme was not required); *United States* v. *Reid*, 533 F.2d at 1261-62 (not necessary to show victim actually incurred loss), the emphasis on "*actual* harm" (emphasis supplied) projects to the layman a requirement that there be a threat of monetary loss.

Later instructions on specific intent also helped to cure any defect in the instructions on "scheme to defraud." There the district court did focus the jury's attention on the need to find that the defendants contemplated some kind of pecuniary harm to the employer. It defined "intent to defraud" as follows:

> Now, to act with intent to defraud means to act wilfully and with specific intent to deceive or cheat, ordinarily for the purpose of either causing some *financial* loss to another or bringing about some *financial* gain to one's self.

Tr. at 3209-10 (emphasis supplied). Although the emphasis on financial loss and benefit is weakened somewhat by the fact that this instruction appears thirty-two pages after the challenged portion defining "scheme to defraud," the district court specifically connected up this definition of "intent to defraud" with the prior instructions on the wire fraud counts.[21] Thus, a conscientious and attentive juror viewing the instructions as a whole, would have hesitated to convict on the wire fraud counts without finding that the defendants did something to

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[21] The district court's exact prefatory remarks were:

> Now, ladies and gentlemen, during the course of my discussions and instructions really—I guess I should say instructions with you concerning the various elements of the offenses charged in this indictment, I mentioned intent many times. In the wire fraud—in the wire fraud counts, counts one, three, four and five, and in the conspiracy count, count seven, I made it clear to you that one of the essential elements of each offense was specific intent.

Tr. at 3208.

show they intended to take a financial or business advantage of Raytheon.[22]

Moreover, although the central instruction on "scheme to defraud" failed to define a legally significant term like "material non-disclosure," and the curing instruction on specific intent came much later in the charge, we do not believe the instructions were significantly confusing for another reason. In the context of this trial, and in light of the actual evidence and arguments presented to the jury we think it extremely unlikely that the jury was misled into thinking that the mere failure to disclose Lemire's and Carver's conflicts of interest without any other action on their part against Raytheon's business interests was sufficient to constitute wire fraud. As the defense itself noted, "[t]he evidence introduced by the government during the trial focused on . . . alleged excessive charges." Brief for Appellants at 27. And the government's closing argument mentioned Lemire's failure to disclose a conflict of interest only as part of a scheme to hurt Raytheon financially either by overcharging or denying Raytheon the opportunity to ship goods more cheaply.[23] In sum, the jurors would

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[22] We reached a similar conclusion in *Post*, 407 F.2d at 329, where we found that the phrases "intentionally converted" and "knowingly use[d]" in the charge sufficiently apprised the jury of the need to find specific intent to defraud. In *Post*, the district court had stated in a prior instruction that the jury was to acquit if it found that a golf club's directors used the club's funds for the club's benefit. *Id.* at 328; *see also Feldman*, 711 F.2d at 765 ("intent to defraud" not in statement of elements of mail fraud, but definition elsewhere made clear that jury could only convict if it found that defendant committed acts with purpose of defrauding employer).

[23] We find it significant that in his closing argument summing up the government's proof, the prosecutor explicitly and exclusively spoke of receipt of a $2.1 million dollar kickback:

> The government has proved essentially that four men and a corporation took $2 million, one hundred-and-some odd thou-

have had to shift from consideration of the major thrust of the government's evidence and arguments and dwell

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> sand from the Raytheon Company by fraud in an agreement in which they agreed with two employees of the Raytheon Company to give them a payoff, a kickback, a bribe—whatever you want to call it—of over a million dollars in order that they be given the contracts which generated those two million dollars. That's what it all really boils down to.

Tr. at 2904. Conversely, we find unpersuasive defendants' suggestion that the government's closing argument "played upon the theme" of mere failure to disclose Lemire's and Carver's conflict of interest. Brief for Appellant at 31. The prosecutor himself focused on the need to show the defendants' specific intent to defraud Raytheon of money when he argued:

> I would like to say also that while I will make these remarks, remember that the United States has proved that each of the defendants received approximately a half-a-million dollars of the proceeds in this case. I make that point to you so that as I go through the evidence, you can use that fact to consider what did they feel, what did they think, what did they intend, when they did a particular act. It is very important to consider that when going through the evidence, and I would like for you to remember that fact.
>
> An act may be totally meaningless; it may be innocent, but when considering the fact that—for example, when Mr. Lemire awarded contracts to IMS, it is important to consider that the evidence has shown that at least $400,000, which came directly out of that contract, went into the bank account of his in the Caymun Islands. You have to review and look at why did he let that contract.
>
> You have to consider what must have been in his mind when he did that act or some other act that I will be touching upon. It is somewhat like reviewing a movie when you know what the ending is. Sometimes when you are looking at a movie you say to yourself, "I wonder why he did this?" or, "I wonder why that happened?" If you know the ending and you look at the movie again, you know exactly the why's and wherefore's.
>
> It is also important because the Government has to prove to you that each of these defendants specifically intended to defraud the Raytheon Company, and we can't prove to you by some picture in the defendants' mind what was going on in his

on a few ambiguous lines in an eighty-six page charge in order to convict on an improper theory.

The verdict itself also suggests that the jury did not in fact base its conviction solely on the existence and nondisclosure of Lemire's and Carver's conflicts of interest. The jury convicted all the defendants of count two, interstate transportation of a security taken by fraud. In order to do so, under the statute and under the instructions, not challenged here, it must have determined that a $775,008 check paid to Generation Holding was "stolen, converted or taken by fraud." Tr. 3182. The evidence presented identified no means by which that check could have been "taken by fraud" other than by the defendants' fraudulent scheme. To have found that the check was "taken by fraud," the jury would at least have had to conclude that the shipping contract for which the check was payment would not have been consummated but for the fraud. This conclusion would not follow from a finding of a mere failure to disclose a theoretical conflict of interest; the jury must have found that the fraud affected how Raytheon shipped the modular housing. The conviction on count two thus carries a necessary implication that the jury actually did find that the defendants

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mind when he did something, and it is important to remember that—the totality of what we have shown.

Tr. at 2911-12. In fact, the prosecutor's argument consistently played on the theme that in addition to the undisclosed conflict of interest, defendant Lemire's activity indicated that he did intend to deprive Raytheon of money or shipping opportunities. *See, e.g.*, Tr. at 2921 ("If [Lemire] had been truly faithful to his duties and responsibilities to his employer he would have looked into [IMS contentions that the shipping costs were high] . . . [B]ut he didn't . . . because he didn't want anybody taking a hard, long look at that transportation because he knew he was getting a piece of it."); Tr. at 3103-04 ("The mere fact that Mr. Lemire let these contracts C & F is not criminal . . . . The point here is if [sic] Mr. Lemire made the choice to go C & F because he firmly believed that it saved money, or did he go C & F because he was being paid a half million dollars.")

defrauded Raytheon of at least $775,008. Hence it is reasonable to assume that the conviction on the mail fraud counts was based on the same finding that a scheme existed to defraud Raytheon of that money.

Even were we less certain that the offending language of the instructions did not control the verdict, we would still hesitate to reverse. To the extent the instructions were confusing and even misleading, the defense had ample opportunity to make clarifying suggestions. Rule 30 of the Federal Rules of Criminal Procedure states:

> No party may assign as error any portion of the charge or omission herefrom unless he objects thereto before the jury retires to consider its verdict, *stating distinctly the matter to which he objects* and the grounds for the objection.

(Emphasis supplied.) "The rule requires that illegal errors in jury instructions be brought to the attention of the trial judge in order to provide an opportunity for their immediate correction." *United States* v. *Campbell*, 684 F.2d 141, 148 (D.C. Cir. 1982); *United States* v. *Williams*, 521 F.2d 950, 956 (D.C. Cir. 1975). At the pre-charge conference, the defendants did object that the instruction on "scheme to defraud" was confusing, Tr. at 2879, but the trial judge incorporated the bulk of their suggested revisions.[24] Tr. at 2284-87. Following this incorporation, of which the judge notified counsel at the pre-charge conference, the defendants did not apprise the district court of any remaining dissatisfaction with the language of this instruction. We are consequently less receptive to their complaint on appeal that the lan-

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[24] The defendants clearly acquiesced at that time in the part of the charge with which we have the most trouble—that "[a] scheme to defraud an employer of the honest, faithful, and unbiased services of its employees can also come within the scheme to defraud." *See* Tr. at 2877 (statement of defense counselor Vardaman) ("it is not necessary to go on for a full page" since "one of the objects your honor is going to instruct will be if Raytheon is defrauded of the honest and faithful services of Mr. Carver and Mr. Lemire").

guage they reviewed in detail at trial was incorrect or misleading.[25]

We emphasize at this point that if we believed there was a substantial possibility that the jury convicted on an improper legal theory, we would be inclined toward a liberal construction of the defendants' obvious dissatisfaction with the instruction on alternative objects of the "scheme to defraud," even though their objection was based on grounds of surprise and variance rather than legal insufficiency. But we find no such significant likelihood here.

C. *Alleged Variance in the Theory of the Case*

The defendants mainly attack the instructions on the ground that they changed the theory of the case from that charged by the indictment. They characterize as a

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[25] Where, as here, the defense fails to specify sufficiently the portion of the charge to which it objects, and therefore fails to comport with Rule 30, we will reverse only if the instruction is "plain error"—if the error causes a substantial miscarriage of justice. *See, e.g.*, United States v. Baker, 693 F.2d 183 (D.C. Cir. 1982) (no miscarriage of justice since evidence against defendants is overwhelming); *Campbell*, 684 F.2d at 149 (although instructions technically could have allowed jury to convict for bribery based on what is merely receipt of illegal gratuities, fact that evidence focused on activity that would constitute bribery meant that "[i]n the context of the trial as a whole, [instructions were] not plain error"). Since in this case we find the confusing instructions were not prejudicial, they certainly do not constitute plain error.

Of course, for those objections that the defendants raised with sufficient particularity to apprise the trial judge of their dissatisfaction, we do not demand "plain error" in order to reverse. The only relevant specific objection that the district court did not accommodate was the defendants' suggestion that the court instruct on the distinction between active and constructive fraud. *See* Tr. 2878. But the inclusion of the words materiality and specific intent, for which the defense asked, along with its own proposed definition of intent to defraud clearly covered the same territory. Thus, the district court's failure to explicitly state that mail fraud must be "active" was, at worst, harmless error.

"key element of the government's theory" in the indictment and at trial, alleged inflated shipping rates that Interconex charged Raytheon. Brief for Appellant at 22. They say the indictment alleged a scheme to defraud with a single object—to obtain $2.1 million in excess profits by using Lemire and Carver as disloyal intermediaries in the contracting process. *Id.* at 22-23. The defendants thus claim that the instruction allowing the jury to convict solely for fraudulent deprivation of Raytheon's employees' honest and loyal services changed the basic elements of the crime from the indictment. They further support this claim by noting a small, but in their view fundamental, word difference between the government's initial jury instructions, proposed before the trial, and the government's final instructions, proposed after the defense presented its case. The initial instruction on the elements of wire fraud read:

> The government must prove that . . . the defendants devised . . . a scheme or artifice to defraud . . . with the following objects: (1) . . . to defraud the Raytheon Company of its right to the honest, . . . loyal . . . services . . . of its employees . . .; (2) . . . to obtain money from the Raytheon Company by means of false pretenses.

J.A. 374. Over the defense counsel's vehement objection, the final instructions substituted "with *one or both* of the two following objects" for "with the following objects." Tr. at 2866-76 (emphasis supplied). The defendants argue that the modified jury instructions indicated that the government abandoned its original theory premised on inflating shipping charges midstream for a broader one premised on general disloyalty through undisclosed conflicts. Brief for Appellant at 29, 31-32.

We note at the outset that "proof at trial need not, indeed cannot, be a precise replica of the charges contained in the indictment." *United States* v. *Heimann*, 705 F.2d 662 (2d Cir. 1983). Since the instructions tell

the jury how the law relates to the facts, they too will deviate somewhat from the indictment. The real issue is not whether the instructions vary from the indictment, but how far they may vary before the variance infringes on the defendant's rights. *See Berger* v. *United States*, 295 U.S. 78, 82 (1935); *United States* v. *Mangieri*, 694 F.2d 1270, 1278 (D.C. Cir. 1982); *United States* v. *Jordan*, 626 F.2d 928, 931 (D.C. Cir. 1980) (per curiam). A substantial deviation of instructions from an indictment is impermissible because first it requires a defendant to answer a criminal charge that was not brought by a grand jury, *see Russell* v. *United States*, 369 U.S. 749 (1962) (bill of particulars does not preserved defendant's right to be tried on a charge framed by a grand jury); *Stirone* v. *United States*, 361 U.S. 212 (1960); *Gaither* v. *United States*, 412 F.2d 1061, 1066 (D.C. Cir. 1969), and second it denies the defendant sufficient notice to prepare and present an adequate defense.[28] *See Berger*, 295 U.S. at 81-82; *United States* v. *Goss*, 650 F.2d 1336, 1346 n.11 (5th Cir. 1981); *United States* v. *Smolar*, 557 F.2d 13, 19 (1st Cir.), *cert. denied*, 434 U.S. 866, 966, 971 (1977); *cf. Pollack*, 534 F.2d at 970 (indictment sufficient because it outlined mail and wire fraud scheme with sufficient particularity to avoid surprise and permit defendants to prepare a defense). We believe, however, that the defendants here were denied neither right.

The defendant is deprived of his right to have all charges screened by the grand jury only if the deviation

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[28] Variance between instructions and the indictment can also raise a charge that the defendant is "unprotected against prosecution for the same offense." United States v. Freeman, 514 F.2d 1184, 1189 (10th Cir. 1975); *see also Berger*, 295 U.S. at 82. The variance of the instructions from the indictment in this case, however, presents no possibility of double jeopardy, since both clearly charge the same offense based on the same conduct so that further prosecution for that offense would be barred. *See Mangieri*, 694 F.2d at 28 n.7; *Freeman*, 514 F.2d at 1189.

in proof or instructions from the specifics of the indictment affects an essential element of the offense charged. *See Managieri*, 694 F.2d at 1277-78; *Gaither*, 413 F.2d at 1071; *United States* v. *Gonzales*, 661 F.2d 488, 492 (5th Cir. 1981). Here the challenged instructions did not deviate from the indictment regarding any element of wire fraud.[27] The indictment alleged that the defendants devised a scheme to defraud Raytheon of its right to Carver's and Lemire's loyal services, *and* to obtain money from Raytheon by false pretenses.[28] The correct method of pleading alternative means of committing a single crime is to allege the means in the conjunctive. *See Joyce* v. *United States*, 454 F.2d 971, 976 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 969 (1972); *Morrison* v. *United States*, 365 F.2d 521, 522-23 (D.C. Cir. 1966); *United States* v. *Hicks*, 619 F.2d 752, 758 (8th Cir. 1980). Hence, the opposed instruction merely makes explicit that either object of the scheme was sufficient.

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[27] We reach this conclusion only after our determination that it was highly improbable that the jury would have interpreted the instructions to convict solely for failure to disclose a conflict of interest which held no potential for specific business harm to Raytheon.

[28] The exact language of this part of the indictment charges that:

> defendants ROY R. CARVER, JOSEPH C. LEMIRE, LIONEL W. ACHUCK, JON T. STEPHENS, and INTERCONEX, INC., together with others known and unknown to the Grand Jury, devised and intended to devise and employ a scheme and artifice (1) to defraud the Raytheon Company of its right to the honest, conscientious, faithful, loyal, disinterested and unbiased services, actions and performance of duties by its employee, ROY R. CARVER and JOSEPH C. LEMIRE, free from bribery, corruption, partiality, willful omission, bias, dishonesty, deceit, misconduct and fraud and (2) to obtain money from the Raytheon Company by means of false pretenses, and representations, which defendants well knew would be and were false when made.

J.A. at 137.

A variance that does not alter an essential element of the charge may still deprive the defendant of an opportunity to meet the prosecutor's case. *Berger*, 295 U.S. at 82; *Mangieri*, 694 F.2d at 1277; *Gaither*, 413 F.2d at 1071. But here the indictment gave warning that the government might argue for a verdict based on deprivation of employee loyalty. In addition, its proposed instructions before the trial repeated that theory.

> The object of the scheme need not be money or any form of tangible property. A scheme to defraud an employer of the honest, faithful and unbiased services of its employees can come within the meaning of "scheme or artifice to defraud" as set forth in the wire fraud statute.

J.A. at 233. Even if the indictment was ambiguous, this instruction clearly put the defendants on notice that the government did not believe its case hinged solely on proof of inflated shipping charges.[20]

The defense cites *Smolar*, 557 F.2d 13, and *United States* v. *San Juan*, 545 F.2d 314 (2d Cir. 1976) as "[t]he applicable cases" holding "that the government may not change the theory of the case after the evidence has been closed." Reply Brief for Appellants at 10. *Smolar*, however, involved a change of the theory of the case from "outright fraud as charged in the indictment, [to] a breach of fiduciary duty." *Smolar*, 557 F.2d at 18. In this case, what happened was very different—at the end of trial the government reasserted a legal theory of the case set out in the indictment. *San Juan* involved a

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[20] Considerable deference should be given to the views of the trial judge on matters of surprise. The trial judge listened to all the testimony and the opening statements, before the defense counsel objected to the modified instruction at the pre-charge conference. The judge stated that she did not understand either the case or the original charge as having been based on a theory that required the government to prove both objects of the scheme. *See* Tr. at 2975.

violation for bringing more than $5000 into the country without filing a customs report. The defendant failed to file a report on the bus on which she entered the country, and refused to file the report minutes later in the customs house. The government explicity and repeatedly assured the court, the jury, and the defense counsel that it was not charging a crime for refusal to file the report in the customs house. 545 F.2d at 319 & n.13. The government changed its theory of the case *on appeal*, after it appeared that the jury had convicted the defendant of failing to file a report on the bus without substantial evidence of wilfulness. Furthermore, the government's assurances had precluded the court from considering the defendant's motion to dismiss the charge because she could not have committed the crime in the customs house. Nothing of that sort ensued here. Hence, we do not find *Smolar* and *San Juan* dispositive of the issue before us.

In sum, the instructions given by the district court did not materially deviate from the indictment. The instructions neither charged the defendants with an offense different from that charged by the grand jury, nor deprived the defendants of an opportunity to present their full defense to the original charges. The more serious question, however, is whether an indictment *and* instructions based on two alternative theories of guilt, one of which may not correctly reflect our interpretation of the law, can lay a sound basis for a conviction. We have discussed that dilemma, in the context of this case, at length, *supra*, at 16-28, and concluded that the way in which the government tried the case as well as the overall thrust of the instructions, sufficiently diluted the effects of the flawed parts of the indictment and instructions. In short, the core of the defendants' most persuasive challenge, which we have rejected, must be the possibility they were convicted under a wrong theory of law, not the technical defense that they suffered from surprise due to variance of the instructions from the indictment.

As we view the case, the government alleged one valid and one possibly invalid theory of guilt, concentrated its proof on the valid theory, and reincarnated the invalid one at the conclusion of the trial in its requests for instructions (unfortunately accepted). The net result was that the jury, sitting through a twenty-nine day trial, heard a snippet of the invalid theory at the beginning, a paragraph or two in an eighty-six page charge at the end, and in between a concentration of proof that there was a scheme to defraud Raytheon through diversion of profits from a specially concocted deal.

We suspect that the astute defense counsel knew, or should have known, from the indictment what the government's ultimate legal position was. That ultimate theory has been the subject of much comment and controversy for several years. The defense may have been relieved when the proof and argument focused on actual money loss, rather than mere breach of fiduciary duty. And when the government resurrected its present theory of breach of fiduciary duty at the end of trial, the defense understandably objected, but its objection should have been on legal—not variance—grounds. Accordingly, we reject the defense argument for reversal based on prejudicial surprise and variance.

III. Evidentiary Rulings

A. *The Summary Witness*

Toward the end of its case-in-chief the government requested that the court allow James Kasper, an FBI agent and certified public accountant, to summarize the evidence about the complex cash flow through offshore companies that the government had introduced via direct examination of its witnesses. Kasper used four summary charts to re-examine this evidence in a more organized fashion. He relied on numerous letters, invoices and bank drafts, as well as the testimony of numerous witnesses already

in evidence to present his summary. Kasper prefaced each piece of his testimony by identifying the document in evidence from which he obtained the information. The defendants objected to Kasper's testimony on the grounds that he was an improper witness under the Federal Rules of Evidence, and his testimony would unfairly prejudice their defense. The district court held a full voir dire examination before ruling that Kasper would be allowed to testify, subject to limiting instructions that his testimony was explanatory and was not itself substantive evidence. The defendants renew on appeal objections rejected by the district court.

They argue that a non-expert summary witness is improper under Federal Rule of Evidence 602. Rule 602 requires that non-experts testify only as to matters of which they have personal knowledge;[30] its purpose is to assure reliability. *See* Fed. R. Evid. 602 advisory committee note. In this case, neither Rule 602's literal language nor its overriding purpose was violated. Kasper did not testify about any of the events underlying the trial: he only summarized evidence about cash flows that several prior witnesses had already offered. As to that evidence, he testified from his personal knowledge of the transcripts and exhibits. Hence Rule 602 does not bar his testimony.

This court has not previously ruled on the admissibility of one witness's summary of evidence already presented by prior witnesses. Other courts, however, have recently confronted the question and permitted such summaries under Rule 1006, allowing for admission into evidence of summaries of documents too voluminous to be conveniently

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[30] Fed. R. Evid. 602 provides:

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter . . . . This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

examined in court. *See, e.g., United States* v. *Atchley*, 699 F.2d 1005 (11th Cir. 1983); *United States* v. *Scales*, 594 F.2d 558 (6th Cir.), *cert. denied*, 441 U.S. 946 (1979); *United States* v. *Evans*, 572 F.2d 455 (5th Cir.), *cert. denied*, 439 U.S. 870 (1978); *United States* v. *Nathan*, 536 F.2d 988, 996 (2d Cir.), *cert. denied*, 429 U.S. 930 (1976). The defendants argue that Rule 1006 was meant to be restricted to summaries of writings *not feasible for direct admission into evidence. See* Reply Brief for Appellants at 24. The language of Rule 1006, however, supports a broader interpretation that would allow summaries of documents already in evidence.[21] The mere fact that the documents at issue are already in evidence assures neither that they can be "conveniently examined in court" nor that they *have* been examined in court. In this case, Judge Johnson explicitly noted that she was "unable to permit in court examination of each [document] by the jury." Tr. at 2016. In any case, we note that Rule 1006 was designed primarily as an exception to the best evidence rule, *see United States* v. *Johnson*, 594 F.2d 1253, 1255 (9th Cir.), *cert. denied*, 444 U.S. 964 (1979), and since the evidence itself here was already before the court, there is no issue of inadmissibility under Rule 1002 as a replacement for the "best evidence." *See* S. Saltzburg & K. Redden, Federal Rules of Evidence Manual 751 (3d ed. 1982). Hence, "[e]ntirely aside from Rule 1006, there would still be ample authority for the admission of [summary testimony] into evidence. . . . There is an established tradition that permits a summary of evidence to be put before the jury with

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[21] Fed. R. Evid. 1006 provides:

> The contents of voluminous writings, recordings or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

proper limiting instructions." *Scales*, 594 F.2d at 563; *see, e.g., United States* v. *Esser*, 520 F.2d 213, 218 (7th Cir. 1975), *cert. denied*, 426 U.S. 947 (1976); *Gordon* v. *United States*, 438 F.2d 858 (5th Cir.), *cert. denied*, 424 U.S. 828 (1971). Thus, we conclude that the Federal Rules of Evidence do not bar use of non-expert summary testimony such as is presented in this case.

The contention that Kasper's testimony unfairly prejudiced the defendants raises more troubling concerns, heightened by the fact acknowledged by Judge Johnson that the non-expert summary evidence was cumulative, and hence subject to challenge under Rule 403. *See* Tr. at 1930; S. Saltzburg & K. Reddon, *supra*, at 751 ("summaries of documents introduced in evidence . . . are better handled under Rule 403" than under Rule 1006); *cf. Zenith Radio Corp* v. *Matsushita Electrical Industrial Co.*, 505 F. Supp. 1313, 1334 (E.D. Pa. 1980) (as amended 1981) (expert opinions that merely rehash evidence inadmissible because unhelpful). Since the summary testimony is relevant, under Rule 403 it is admissible unless the dangers of unfair prejudice it creates outweigh its probative value. *See United States* v. *Burkley*, 591 F.2d 903 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 966 (1979); *United States* v. *Day*, 591 F.2d 861 (D.C. Cir. 1978). Unlike the probative value of expert testimony, which can "instruct the court in the ways of [the expert's] work," *Zenith Radio*, 505 F. Supp. at 1334, the value of a summary witness is more subtle. But, just as an expert can assist a jury by imparting special knowledge that helps the jury to understand technical evidence, a non-expert summary witness can help the jury organize and evaluate evidence which is factually complex and fragmentally revealed in the testimony of a multitude of witnesses throughout the trial. *See Scales*, 594 F.2d at 563 (purpose of summary witness is simply to aid the jury in examination of evidence already admitted).

Nonetheless, there are obvious dangers posed by summarization of evidence. *United States* v. *Apodaca*, 666

F.2d 89 (5th Cir.), *cert. denied*, —— U.S. ——, 103 S.Ct. 53 (1982). Although we usually defer to the district court's assessment of whether the probative value of evidence outweighs the possibility of prejudice, *see United States* v. *Wright*, 489 F.2d 1181, 1186 (D.C. Cir. 1973) (standard of review is abuse of discretion); *United States* v. *Dennis*, 625 F.2d 782 (8th Cir. 1980), the pervasiveness of these dangers requires that we review the use of a summary witness closely.

One danger is that a jury will treat the summary as additional evidence or as corroborative of the truth of the underlying testimony. "This danger has led to the requirement of 'guarding instructions' to the effect that the [summary] is not itself evidence but is only an aid in evaluating evidence. Even with such instructions, a summary may be considered too conclusory, or as emphasizing too much certain portions of the Government's case, or as presenting incompetent facts." *Scales*, 594 F.2d at 564. In this case, however, we think the dangers are shadow, not substance. The trial judge gave the requisite guarding instructions[22] and, through voir dire examination,

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[22] Before Kasper testified, Judge Johnson told the jury:

> [T]he testimony of an accountant—and that is what Mr. Kasper is—and the prepared charts and summaries that he will show you, have been received for the sole purpose of explaining facts disclosed by books, records, other documents, and testimony; in other words, evidence in this case.
>
> Such charts and summaries, as you see there, are not, in and of themselves proof of any facts. If such charts and summaries do not correctly reflect the facts or figures shown by the evidence, as you have heard in this case, then you should totally disregard those charts.
>
> In other words, such charts or summaries are used only as a matter of convenience.
>
> So if, and to the extent that, you find that they are not in truth summaries of facts or evidence of figures shown by evidence, as you have heard it, you are to disregard them entirely.

Tr. at 2021-22.

allowed the defense to object to any portions of the summary testimony before the jury heard them. This device minimized substantially the danger that the jury might treat the summary as substantive evidence. *See Scales*, 594 F.2d at 563-64; *Gordon*, 438 F.2d at 877; *see also Esser*, 520 F.2d at 218 ("[s]ummary testimony does not allow witness to invade the province of the jury").

The defendants also had full opportunity to cross-examine Kasper, further alleviating any danger of inaccuracy or unfair characterization. *See United States* v. *King*, 616 F.2d 1034, 1041 (8th Cir.), *cert. denied*, 446 U.S. 969 (1980); *Gordon*, 438 F.2d at 876-77. They argue nonetheless that by restricting his summary to testimony given during direct (rather than cross) examination of government witnesses, Kasper undermined their ability to cross-examine him. However, they point to no instance where the cross-examination of a witness whose direct testimony was summarized would have changed the summary. Defendants cite *Flemister* v. *United States*, 260 F.2d 513 (5th Cir. 1958), for the proposition that a summary witness must present "a full and even handed summary." Reply Brief for Appellants at 52. But *Flemister* clearly declares: "A summary, to be admissible, we think need not give effect to the contentions of the accused." *Id.* at 517. *Flemister* only required that the summary be what it purports to be. *Id.* Since Kasper never purported to do more than summarize the government's evidence on cash flows, his testimony was in accord with *Flemister*. The defense specifically points to the trial judge's refusal to allow cross-examination about Interconex's cost of shipping as indicative of unfairly circumscribed cross-examination. Brief for Appellants at 54. But that question was outside the scope of the witness's direct testimony, which dealt only with cash flows, and would have required the witness to refer to statements not in evidence. Tr. at 2053-54. The cross-examination at voir dire, where the defense repeatedly ques-

tioned the accuracy of the summary and convinced the trial judge to bar testimony based on one of the four summary charts the government hoped to introduce, further indicates that the cross-examination was not unfairly circumscribed. Tr. at 2002-03.

True, Kasper did not prepare the summary charts himself. *Cf. Gordon*, 438 F.2d at 877 (noting with approval that agent who prepared the chart was available for cross-examination). Kasper, however had carefully reviewed the charts and ensured that they reflected information contained in documents already in evidence. He was able to identify the source of all the information on the chart and to explain how all the dollar figures were derived. The defense counsel also made the jury well aware that Kasper had not prepared the charts. Tr. at 2036-37. Although we believe the better practice is to require that summary charts be prepared by the witness, in this case the fact that Kasper did not prepare the charts in no way hampered the defendants' ability to cross-examine him, and therefore did not prejudice the defense.

A second danger posed by summarized evidence is the subtle introduction of otherwise inadmissible evidence. Rule 1006 was not meant to relieve the government of its obligation to lay a sufficient foundation for any evidence it expects the jury to consider. "Requiring the proponent [of a summary] to show the admissibility of the underlying materials is necessary to protect the integrity of the Federal Rules [of Evidence]." *Johnson*, 594 F.2d at 1255; *see also United States* v. *Goss*, 650 F.2d at 1244 n.5; *King*, 616 F.2d at 1041. The defendants contend that some of Kasper's testimony was inadmissible because he based it on material not in evidence. Although Kasper relied on out-of-court statements for *his understanding* of some of the financial transactions, he did not testify about

anything other than what was already in evidence.[23] Hence, the defendants' contentions that Kasper introduced otherwise inadmissible evidence are unfounded.

A third danger posed by summaries of evidence is that they provide an extra summation for the government that comes from the witness stand rather than the counsel's lecturn. The distinction between valid summary testimony and argument is not a bright line. The task of organizing testimony can quickly turn into the marshalling of facts to support a particular position. But the word "argument" connotes a taking of sides in a controversy.[24] Thus, a summary should not draw controversial inferences or pronounced judgment; these functions are best left to the closing argument of counsel. Here, however, the summary involved only routine computations and culling through of documents to eliminate confusing and extraneous evidence. Consequently we find no force to the argument that Kasper's testimony provided an unwarranted second closing for the government.

We have reviewed in detail the summary of evidence provided by Kasper and we find that the summary did not stray from evidence already presented. The district court carefully considered the need for a summary after hearing all the government's witnesses testify, and felt that the jury would benefit from the summary testimony.

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[23] Since the judge, prosecutor and defense counsel all heard the evidence upon which Kasper based his summary, he was unlikely to stray from that evidentiary base without quickly being stopped. In fact, at one point the witness inadvertently started to discuss material not in evidence, and the prosecutor prevented him from doing so. *See* Tr. at 2024, 2404.

[24] "Argument" means:

> a coherent series of reasons, statements, or facts intended to support or a point of view: a discussion often involving a controversial topic.

Webster's Third New Int'l Dictionary 116 (1976).

Thus, allowing Kasper to testify was no abuse of discretion by the district court.

B. *Excluded Defense Exhibits*

The defendants appeal the district court's exclusion of three documents that they attempted to put into evidence. Two of the documents (DX201, DX203) were internal memoranda prepared as part of Raytheon's own investigation of the Saudi Arabia housing contracts. The third excluded document (DX155) was a memorandum setting forth projected freight rates for shipping goods with Waterman, written before Raytheon entered into the Waterman shipping agreement. The defendants argue that these excluded exhibits are important corroboration of Lemire's testimony that he pursued Raytheon's best interests at all times during the bidding for the Saudi Arabia housing contracts.

1. *Exhibits DX201 and DX203*

The government objected to admission of both memoranda, DX201 and DX203, as hearsay, and the district court sustained its objection. The defendants' claim that although the memoranda clearly are hearsay, they come within the "business records" exception to the hearsay rule. Federal Rule of Evidence 803(6), the codification of this exception, requires that a "memorandum of events . . . [be] made at or near the time [of the events]" and that "it [be] the regular practice of that business activity to make the memorandum." We agree with the district court that neither DX201 nor DX203 meets either criteria.

DX201 was prepared by Lemire for his superior on November 5, 1976, and summarized why he had decided it was advantageous for Raytheon to award the housing contract C&F. By his own admission, it provides "a history and background of the transaction" from December 5, 1975 to June 19, 1976, when the second housing contract was awarded to IMS. *See* Lodged Materials at 3.

The lengthy interval between the time the memorandum was written, and some of the events it describes (one year and ten months) does not meet the exception's "timeliness requirement," and therefore it is not admissible under Rule 803(6). *See United States* v. *Kim*, 595 F.2d 755, 760 (D.C. Cir. 1979) (timeliness requirement not waived even if accuracy of information not suspect). DX203, prepared by Mr. Waxman, a subordinate of Lemire, was a review of the entire history of the two modular housing contracts with IMS, and was written after Lemire left the company. Since it was written after the Lemire memo and describes events that occurred during the same time period as those in the earlier memo, it too suffers from being untimely.

Additionally, both memoranda were not admissible under Rule 803(6) because it was not a regular business practice to make memoranda detailing the history of contracts Raytheon awarded. *See Palmer* v. *Hoffman*, 318 U.S. 109 (1943). "When a document is made for something other than a *regular business purpose*, it does not fall within the business records exception." *Kim*, 595 F.2d at 761 (emphasis supplied). We think that memoranda prepared as part of an investigation into substantial abnormal procedures are not prepared for a regular business purpose. We find such memoranda similar to accident reports, which generally are not admissible as business records. *See Palmer* v. *Hoffman*, 318 U.S. at 113.[20] Thus, the district court did not err in excluding DX201 and DX203.

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[20] The defendants urge that "modern courts have severely limited [*Palmer's*] application under the [Federal] Rules [of Evidence]." Reply Brief for Appellants at 27. They cite Gardner v. Chevron U.S.A. Inc., 675 F.2d 658, 660 (5th Cir. 1982) in support of this proposition. But *Gardner* held that the trial court's admission of an accident report *was error*. It did consider that error harmless but only because a hearing determined that no one either showed or read the accident report to the jury. *Gardner* clearly demonstrates that the district court correctly excluded DX201 and DX203.

2. *Exhibit DX155*

DX155 (dealing with pre-contract proposed Waterman freight rates) was excluded on the grounds that it was irrelevant, because the company had entered the Waterman contract by the time Lemire let the housing contract. The government argues that the Waterman contract rate is the only pertinent rate for comparison to Interconex's rate. The relevance of DX155 cannot so easily be dismissed, however, since it may have contained additional information about prevailing freight rates that would demonstrate Lemire acted reasonably in accepting the Interconex rate. Any error in excluding DX155 was harmless, however, because Lemire was allowed to testify about the substance of the memo. *See* Tr. at 2218. DX155 was thus culmulative, and it was within the trial judge's discretion to exclude it. *See Hamling* v. *United States*, 418 U.S. 87, 127 (1974) ("[t]he District Court retains considerable latitude even with admittedly relevant evidence in rejecting that which is cumulative").

IV. Sufficiency of Evidence Against Achuck

Achuck challenges the government's evidence against him as insufficient to support his conviction, He points out that "[t]here was no proof whatsoever that [he] played any role in the submission of the Interconex/IMS bid to Raytheon, or that he attended any meetings or had a single conversation concerning the modular housing shipping contract prior to Raytheon's takeover of the fourth charter." Brief for Appellants at 61-62.

In reviewing the evidence for sufficiency, we must consider all of the evidence in the light most favorable to the government. *Glasser* v. *United States*, 315 U.S. 60 (1942); *United States* v. *Lewis*, 626 F.2d 940, 951 (D.C. Cir. 1980); *Crawford* v. *United States*, 375 F.2d 332, 334 (D.C. Cir. 1967). We must also accept "all reasonable inferences supporting the verdict." *United States* v. *Habel*, 613 F.2d 1821 (5th Cir.), *cert. denied*, 447 U.S.

925 (1980); *see also United States* v. *Skinner*, 425 F.2d 552, 554 (D.C. 1970). With this in mind, we find sufficient evidence to support Achuck's conviction.

The evidence showed that Achuck was intimately involved in setting up various offshore accounts through which the defendants channelled the money Raytheon paid for shipping. These accounts were established just prior to the award of the IMS contract for housing. The evidence suggests that they served no function other than as a conduit for money paid as part of that contract. Thus, a jury might reasonably infer that Achuck set up those accounts because he had foreknowledge that Interconex would get the bid for shipping the housing to Saudi Arabia, and that that venture would generate excessive profits. In light of these financial dealings, it is significant as well that Achuck cannot otherwise explain the hidden receipt of $500,000 from the shipping contract. The jury could have reasonably inferred from Achuck's receipt of his share of the scheme's bounty that he knew of the scheme.

Achuck seems to believe that because he did not participate in, or even know about, the actual mechanism by which the others perpetrated the fraud he cannot be convicted. This is not so.[46] The evidence detailed above was

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[46] Although the evidence against Achuck does not indicate that he knew the precise mechanism by which the fraud was perpetrated, it is similar in nature to that found sufficient to convict the defendant in United States v. Tilton, 610 F.2d 302 (5th Cir. 1980). Tilton was responsible for contracting out some of his employer's work. He received a kickback from the shops to which he provided the work, and, to pay this kickback the shops padded the invoices to Tilton's employer. There was no evidence that Tilton knew of the padded invoices by which the scheme to defraud was consummated. Nonetheless, the court upheld the jury verdict finding him guilty of mail fraud because it found the inflated invoices were a natural consequence of the unlawful agreement or kickback. Tilton should have known that the money had to come from somewhere and, the most likely source would be Tilton's employer since the bribe was in

certainly sufficient to support a finding that Achuck conspired to commit fraud on Raytheon. Thus, he can also be convicted of the substantive offenses of wire fraud and transporting securities taken by fraud based on the foreseeable acts of his co-conspirators perpetrated in furtherance of the conspiracy. *Pinkerton* v. *United States*, 328 U.S. 640 (1946). We thus uphold the jury's conviction of Achuck.

V. RESTITUTION

Stephens and Achuck[37] attack the validity of the district court order conditioning their suspended sentences

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exchange for that contract. *Id.* at 308. Similarly, Achuck had reason to foresee that the money paid to GH, and ultimately to Lemire, Carver, Achuck, and Stephens, which had to come from somewhere, would most likely have come as a result of the IMS contract in which Interconex participated.

[37] The government argues that Achuck waived his right to challenge the restitution order on appeal because Achuck's sentencing memorandum filed the day before sentencing, stated:

> Consistent with Mr. Achuck's sincere feeling of sorrow and remorse, he is fully prepared to make restitution in any amount the court considers appropriate without any challenge whatsoever.

Achuck now argues that this waives only his right to challenge the amount of restitution, not his right to challenge the imposition of restitution in the first place. He points out that at the time the memorandum was written the district court had already stated that it would impose restitution. The fact remains, however, that Achuck never communicated the nature of his problem with restitution to the sentencing judge, and preservation of the point on appeal requires communication of some sort of comprehensible challenge to the sentencing court. *See, e.g.*, State v. Garner, 115 Ariz. 579, 566 P.2d 1065 (Ct. App. 1977) (defendant's failure to object to amount of restitution order and the procedure by which it was set bars due process challenge on appeal). We need not reach the question of whether Achuck could have waived a challenge to the amount of restitution ordered when that amount was not yet determined, since we find below that the amount was supported by the record; Biddy v. State, 138 Ga. App. 4, 5, 225 S.E. 2d 448, 451 (1976) (amount of restitution sustained only because it was not contested at sentencing); Commonwealth v. Walton, 488 Pa. 588, 397 A.2d 1179 (1979) (same).

on respective restitution of $1,000,000 and $750,000 to Raytheon. They argue first that the district court may not order restitution because the jury verdict does not depend on a finding of an actual monetary loss to Raytheon. Second, even if the district court is authorized to order restitution as a condition of probation for the suspended sentences, Stephens contests his particular restitution amount as arbitrary and unsupported by any finding by the district court.

We start from the premise that the trial judge has wide discretion in sentencing including the setting of conditions on probation and the ordering of restitution. *See United States* v. *Mitsubishi International Corp.*, 677 F.2d 785, 787 (9th Cir. 1982) (ordering contribution to National Alliance for Business program); *United States* v. *Roberts*, 619 F.2d 1, 2 (7th Cir. 1979) (ordering restitution). This assumption is supported by the language of the Probation Act, 18 U.S.C. § 3651 (1976), which authorizes restitution as a condition of probation. It provides:

> Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

So long, then, as restitution in any particular case is designed to further rehabilitation of the defendant without overly sacrificing society's interests in deterrence, retribution and community safety, we should presumably uphold the order of the trial judge. *See United States* v. *Restor*, 679 F.2d 338, 340 (3d Cir. 1982); *United States* v. *Margala*, 662 F.2d 622, 627 (9th Cir. 1982) (as amended) (flexible standard required by "uncertainty about how rehabilitation is accomplished") (quoting

United States v. *Consuelo-Gonzalez*, 521 F.2d 257, 264 9th Cir. 1975)).

The defendants, however, premise their appeal against the condition of restitution on other, more specific, language later in the Probation Act:

> While on probation and among other conditions thereof, the defendant—
>
> . . . .
>
> May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had
>
> . . . .

18 U.S.C. § 3651 (1976). Courts construing the Act have interpreted this language as "limiting restitution to amounts for which the defendant is actually convicted." *United States* v. *Orr*., 691 F.2d 431 (9th Cir. 1982) (citing cases in accord); *see also United States* v. *Johnson*, 700 F.2d 699 (11th Cir. 1983); *United States* v. *Brown*, 699 F.2d 704 (5th Cir. 1983); *United States* v. *Follette*, 32 F. Supp. 953 (E.D. Pa. 1940) (first stating this construction). Relying on such holdings, the defendants read this language to preclude the trial judge from ordering restitution unless the jury verdict included a determination of loss to the victim in a determined amount. They claim that without this determination, a subsequent civil suit is the only means of evaluating the loss contemplated by § 3651. Brief for Appellant at 71-72, (quoting Best & Birzon, *Conditions of Probation: An Analysis*, 51 Geo. L.J. 809, 828 (1963)). The defendants' position, which treats the requirements for proof of pecuniary loss due to criminal activity as equivalent to those for proof of loss due to civil wrongs, however, ignores the state's important interests in rehabilitation and justice that are furthered by restitution.[25] "Probation is part of the composite sanction im-

[25] Consistent with this position, one court upheld an order that a defendant pay restitution in a criminal case although he had

posed for law violation, and the validity of probation conditions is to be viewed in that light, not weighed in isolation." *United States* v. *Tonry*, 605 F.2d 144 (5th Cir. 1979). In addition, the defendants' position is eroded by recent case law which generally holds that once the defendant has been convicted the trial judge may order restitution for the amount of loss she finds the criminal violation caused.[20] *See, e.g., Johnson*, 700 F.2d 699; *United States* v. *Lynch*, 699 F.2d 889, 845-46 (7th Cir. 1982); *Brown*, 699 F.2d at 711-12; *Roberts*, 619 F.2d at 2. *But cf. United States* v. *Tiler*, 602 F.2d 30, 34 (2d Cir. 1979) (affirming order but noting that if district court had ordered restitution rather than a bond to ensure payment of loss to be determined in later proceeding, that would raise a "[d]ifferent question").

We turn then to determine whether the district court abused its authority when it set restitution for Stephens and Achuck. The only limits on the court's discretion to set restitution, aside from the defendant's ability to pay, *see Beardon* v. *Georgia*, —— U.S. ——, 103 S.Ct. 2064 (1983), are that the restitution further the rehabilitation of the defendant, *see Margala*, 662 F.2d at 627, and that the restitution reflect Raytheon's actual loss due to defendant's illegal conduct. *See Lynch*, 688 F.2d at 845-46; *Orr*, 691 F.2d at 482-83. Of course, since it would constitute an abuse of discretion for the district court to assess restitution that exceeds the loss caused by the illegal activity, it would have been helpful for the district court to have made findings of fact elucidating the basis

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been absolved of all civil liability in a civil suit concerning the illegal conduct. *See* Gross v. United States, 228 F.2d 612 (8th Cir. 1956). The defendant was incorporator, president, and a stockholder in a company found civilly liable, but Iowa law precluded personal liability against the defendant. *Id.* at 615.

[20] Some of the cases the defendant cites as limiting restitution merely stand for the proposition that courts cannot order defendants to pay for losses due to criminal conduct charged in counts to which they neither pled guilty nor were found guilty. *See, e.g.*, United States v. Orr, 691 F.2d at 482-84.

for its monetary assessment. Here the district court made no such findings. For this reason the defendant Stephens contends that the court acted arbitrarily in setting the amount of restitution. We do not so find.

We agree that where the trial record does not clearly support the district court's assessment of loss due to illegal activity, the court must support its restitution order with additional findings of fact. Failure to so justify the amount of restitution would leave a reviewing court in the dark as to whether the amount was legal, and would require us to reverse and remand for factual findings. *See, e.g., Johnson*, 700 F.2d at 701-02 (remanding for district court to entertain such arguments as would be appropriate in support of a motion challenging a sentence as illegal); *Brown*, 699 F.2d at 712 (remanding for findings of fact because trial judge explicitly relied on presentence report in fashioning restitution, and that report was not in the record). Here, however, the record was sufficiently clear for us to competently determine that the district court's restitution order was proper. The evidence indicated that Raytheon lost $600,000 to $900,000 on each of the first three shipments of housing by not chartering a boat itself. Tr. 971, 975. In addition, independent evidence showed that $2,131,480 from the Interconex shipping contract went to GH, and was subsequently split, probably evenly, between Lemire, Carver, Stephens and Achuck. Thus, the district court could have properly assessed $1 million restitution against Achuck and Stephens as "the principals of Interconex." Sentencing of Stephens at 35.[40] The court chose to order

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[40] The district court recognized that the money was probably split four ways. It decided, however, to assess restitution only against Stephens and Achuck, stating:

> I can and shall require restitution from the principals of Interconex, because you, in my view, the principals of Interconex, defrauded Raytheon.
>
> Now you may have chosen to give some money to Mr. Lemire or you may have chosen to give some money to Mr. Carver. I don't know. But I do know you defrauded Raytheon and you

Achuck to pay only $750,000 to Raytheon, presumably reflecting its assessment that Achuck was less culpable and demonstrated a more penitent attitude. *See* Sentencing of Achuck at 19-20. Thus, despite the lack of a rationale for the amount of restitution articulated by the district court, the record supports its order as within its discretion.

Conclusion

Despite the fact that the government advanced on appeal an interpretation of wire fraud that goes beyond the bounds of what we believe the statute prescribes, we do not discern any prejudicial error prompted by that interpretation in this case. In light of the instructions, the arguments and the jury verdicts themselves, we are confident that the jury convicted the defendants only after finding that the defendants' scheme contemplated a pecuniary loss of some kind to Raytheon. In addition, we fail to perceive any prejudice to the defendants caused by other alleged errors cited on appeal. We therefore affirm the convictions.

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could do whatever you wanted with that money that you defrauded them of, but I'm going to see to it that you give Raytheon its money back.

Now you can file suit against Mr. Lemire, and if you believe you gave money to Mr. Carver, you can file suits against him too, but the principals of Interconex are indeed going to pay this money back to Raytheon.

Sentencing of Stephens at 35. Given the court's judgment, based on the evidence as to who initially received the benefits of the scheme, that the principals of Interconex were the real masterminds of the scheme, ordering Achuck and Stephens to repay virtually all losses was not an abuse of discretion.

APPENDIX B

[Despite diligent efforts by counsel, Petitioners have not been able to obtain a copy of the judgment of the Court of Appeals in this case. Counsel for Petitioners have been informed that the usual judgment form is not available at this time. In the event that the judgment form becomes available Petitioners will submit it to this Court immediately.]

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

Criminal Action No. 81-00342-02

No. 82-2492

UNITED STATES OF AMERICA

v.

JOSEPH C. LEMIRE

Appellant

And Consolidated Cases No. 82-2493,
82-2526 and 82-2528

Before: WRIGHT, WALD and EDWARDS, *Circuit Judges*

[Filed Jan. 11, 1984]

ORDER

On consideration of the Petition for Rehearing of Appellants, filed December 19, 1983, it is

ORDERED by the Court that the aforesaid Petition is denied.

For The Court:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

Criminal Action No. 81-00342-02

No. 82-2492

UNITED STATES OF AMERICA

v.

JOSEPH C. LEMIRE

Appellant

And Consolidated Cases No. 82-2493,
82-2526 and 82-2528

Before: ROBINSON, *Chief Judge*; WRIGHT, TAMM, WILKEY, WALD, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA and STARR, *Circuit Judges*

[Filed Jan. 11, 1984]

ORDER

The Suggestion for Rehearing *en banc* of Appellants, filed December 19, 1983, has been circulated to the full Court and no member has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

For The Court:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

APPENDIX D

DISTRICT OF COLUMBIA

Docket No. 81-342

DEFENDANT

Joseph C. Lemire

JUDGMENT AND
PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date December 1, 1982.

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

James T. Reilly, Esquire
(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea,

☐ NOLO CONTENDERE, ☒ NOT GUILTY

[Filed Dec. 8, 1982]

JAMES F. DAVEY
Clerk

FINDING & JUDGMENT

There being a finding/verdict of

☐ NOT GUILTY. Defendant is discharged

☒ GUILTY.

Defendant has been convicted as charged of the offense(s) of

Wire Fraud, 18 USC 1343, 2, Counts 1, 3, 4, and 5; Interstate Transportation of Property Taken by Fraud, 18 USC 2314, 2, Count 2; Conspiracy, 18 USC 371, Count 7.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

Five (5) years and a Fine of One Thousand Dollars ($1,000.00) on Count 1;

Five (5) years and a Fine of Five Thousand Dollars ($5,000.00) on Count 2;

SPECIAL CONDITIONS OF PROBATION

Five (5) years and a Fine of One Thousand Dollars ($1,000.00) on each of Counts 3, 4 and 5;

Five (5) years and a Fine of Ten Thousand Dollars ($10,000.00) on Count 7; said prison terms are to run concurrently and Fines are to run consecutively (Total Fine $18,000.00).

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be impoeed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and reverse probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

Defendant is to surrender himself on 1-4-83 as directed by the Probation Officer of the Court.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

☒ U.S. District Judge

☐ U.S. Magistrate

/s/ Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON

Date 12-1-82

DISTRICT OF COLUMBIA

Docket No. 81-342

DEFENDANT

Jon T. Stephens

JUDGMENT AND
PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date December 3, 1982.

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

John W. Vardaman, Jr., Esquire
(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea,

☐ NOLO CONTENDERE, ☒ NOT GUILTY

[Filed Dec. 7, 1982]

JAMES F. DAVEY
Clerk

FINDING & JUDGMENT

There being a finding/verdict of

☐ NOT GUILTY. Defendant is discharged

☒ GUILTY.

Defendant has been convicted as charged of the offense(s) of

Wire Fraud, 18 USC 1343, 2, Counts 1, 3, 4, and 5; Interstate Transportation of Property Taken by Fraud, 18 USC 2314, 2, Count 2; Conspiracy, 18 USC 371, Count 7.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

Five (5) years & a Fine of One Thousand Dollars ($1,000.00) on Ct. 1;

Five (5) years & a Fine of Five Thousand Dollars ($5,000.00) on Count 2; Five (5) years and a Fine of One Thousand Dollars ($1,000.00) on each of Counts 3, 4 & 5; Five (5) years and a Fine of Ten Thousand Dollars ($10,000.00) on Count 7, said sentences on Counts 1, 3, 4, 5 & 7 are to run concurrently & the Fines on all Counts are to run consecutively. (Total Fine $19,000.00).

SPECIAL CONDITIONS OF PROBATION

Execution of prison term on Count 2 is suspended and the defendant is placed on probation in

charge of the Probation Officer of the Court for a period of Five (5) years consecutive to the prison term on Cts. 1, 3, 4, 5, & 7 on condition he makes restitution in the amount of One Million Dollars ($1,000,000.00).

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

a minimum security Federal Prison camp.
Defendant is to surrender himself on 1-4-83 as directed by the Probation Officer of the Court.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

☒ U.S. District Judge

☐ U.S. Magistrate

/s/ Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON

Date 12-9-82

DISTRICT OF COLUMBIA

Docket No. 81-342

DEFENDANT

Lionel W. Achuck

JUDGMENT AND
PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date December 16, 1982.

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

Robert Gold, Esquire and Jon T. Brown, Esquire
(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea,

☐ NOLO CONTENDERE, ☒ NOT GUILTY

[Filed Dec. 22, 1982]

JAMES F. DAVEY
Clerk

FINDING & JUDGMENT

There being a finding/verdict of

☐ NOT GUILTY. Defendant is discharged

☒ GUILTY.

Defendant has been convicted as charged of the offense(s) of

Wire Fraud, 18 USC 1343, 2, Counts 1, 3, 4, and 5; Interstate Transportation of Property Taken by Fraud, 18 USC 2314, 2, Count 2; Conspiracy, 18 USC 371, Count 7.

SENTENCE OR PROBATION ORDER
SPECIAL CONDITIONS OF PROBATION

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

One (1) year to Three (3) years and a Fine of One Thousand Dollars ($1,000.00) on each of Counts 1, 3, 4 and 5;

One (1) year to Three (3) years and a Fine of Five Thousand Dollars ($5,000.00) on Count 2;

One (1) year to Three (3) years and a Fine of Ten Thousand Dollars ($10,000.00) on Count 7, said Fines are to run consecutive (Total Fine $19,000.00); prison sentences are to run concurrently execution of sentence is suspended and the defendant is placed on probation in charge of the Probation Officer of the Court for a period of Five (5) years on condition the de-

fendant contributes Three Hundred (300) hours of Community Service, makes restitution in the amount of Seven Hundred Fifty Thousand Dollars ($750,000.00) and pays costs.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and reverse probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

☒ U.S. District Judge

☐ U.S. Magistrate

/s/ Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON

Date 12-16-82

DISTRICT OF COLUMBIA

Docket No. 81-342

DEFENDANT

Interconex, Inc.

JUDGMENT AND
PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date December 16, 1982.

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

David Kendall, Esquire
(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea,

☐ NOLO CONTENDERE, ■ NOT GUILTY

[Filed Dec. 22, 1982]

JAMES F. DAVEY
Clerk

FINDING & JUDGMENT

There being a finding/verdict of

☐ NOT GUILTY. Defendant is discharged

☒ GUILTY.

Defendant has been convicted as charged of the offense(s) of

Wire Fraud, 18 USC 1343, 2; Counts 1, 3, 4, and 5; Interstate Transportation of Property Taken by Fraud, 18 USC 2314, 2, Count 2; Conspiracy, 18 USC 371, Count 7.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

A Fine of One Thousand Dollars ($1,000.00) on each of Counts 1, 3, 4 and 5;

A Fine of ($10,000.00) Ten Thousand Dollars on each of Counts 2 and 7 (Total Fine $24,000.00) and the defendant is to pay costs.

SPECIAL CONDITIONS OF PROBATION
ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the proba-

tion period or within a maximum probation period of five years permitted by law, may issue a warrant and reverse probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

☒ U.S. District Judge

☐ U.S. Magistrate

/s/ Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON

Date 12-16-82

APPENDIX E

[STATUTES]

18 U.S.C. § 371. Conspiracy to Commit Offense or to Defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 1341. Frauds and Swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1343. Fraud by Wire, Radio, or Television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 2314. Transportation of Stolen Goods, Securities, Moneys, Fraudulent State Tax Stamps, or Articles Used in Counterfeiting

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false of fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country.

18 U.S.C. § 3651. Suspension of Sentence and Probation

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, if the maximum punishment provided for such offense is more than six months, any court having jurisdiction to try offenses against the United States, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may impose a sentence in excess of six months and provide that the defendant be confined in a jail-type institution or a treatment institution for a period not exceeding six months and that the execution of the remainder of the sentence be suspended

and the defendant placed on probation for such period and upon such terms and conditions as the court deems best.

Probation may be granted whether the offense is punishable by fine or imprisonment or both. If an offense is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment. Probation may be limited to one or more counts or indictments, but, in the absence of express limitation, shall extend to the entire sentence and judgment.

The court may revoke or modify any condition of probation, or may change the period of probation.

The period of probation, together with any extension thereof, shall not exceed five years.

While on probation and among the conditions thereof, the defendant—

May be required to pay a fine in one or several sums; and

May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; and

May be required to provide for the support of any persons, for whose support he is legally responsible.

The court may require a person as conditions of probation to reside in or participate in the program of a residential community treatment center, or both, for all or part of the period of probation: *Provided*, That the Attorney General certifies that adequate treatment facilities, personnel, and programs are available. If the Attorney General determines that the person's residence in the center or participation in its program, or both, should be terminated, because the person can derive no further significant benefits from such residence or participation, or

both, or because his such residence or participation adversely affects the rehabilitation of other residents or participants, he shall so notify the court, which shall thereupon, by order, make such other provision with respect to the person on probation as it deems appropriate.

A person residing in a residential community treatment center may be required to pay such costs incident to residence as the Attorney General deems appropriate.

The court may require a person who is an addict within the meaning of section 4251(a) of this title, or a drug dependent person within the meaning of section 2(q) of the Public Health Service Act, as amended (42 U.S.C. 201), as a condition of probation, to participate in the community supervision programs authorized by section 4255 of this title for all or part of the period of probation.

The defendant's liability for any fine or other punishment imposed as to which probation is granted, shall be fully discharged by the fulfillment of the terms and conditions of probation.

APPENDIX F

[TRANSCRIPT OF REINSTRUCTION OF JURY]

* * * *

[3237] (Whereupon, the jury entered the courtroom at approximately 3:57 P.M., and the following proceedings were had within the presence and hearing of the jury:)

THE COURT: Please be seated, ladies and gentlemen.

The microphone is acting up a little, ladies and gentlemen, but I don't think I use it that much anyway.

Now, ladies and gentlemen, I presume that you have selected a foreperson from among your number; is that correct?

THE JURY: Yes.

THE COURT: Would the foreperson please stand and state your name for the record.

THE FOREPERSON: My name is Carrie L. Thornhill.

THE COURT: Ms. Thornhill, is that your note I have [3238] received asking that I please reinstruct you—reinstruct the jury on the four elements of fraud by wire?

THE FOREPERSON: Yes, ma'am.

THE COURT: Thank you.

Now, ladies and gentlemen, there are three elements of fraud by wire, and I will reinstruct you now on that offense.

In counts one, three, four and five, the defendants are charged—each defendant is charged with the offense of wire fraud. The relevant statute, Section 1343 of Title 18 of the United States Code, provides in pertinent part:

"Whoever having devised or intending to devise any scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations or promises, transmits or causes to be trans-

mitted by means of wire, radio or television communication in interstate or foreign commerce, any writings, signs, signals, pictures or sounds, for the purpose of executing such scheme or artifice shall be guilty of an offense against the laws of the United States."

I shall now instruct you as to the elements of what is commonly referred to as the Federal Wire Fraud Act. These elements apply to counts one, three, four and five of the indictment.

The Government must prove beyond a reasonable doubt [3239] each of the following essential elements of the offense of wire fraud as charged in the four wire fraud counts in the indictment. That is, and I will repeat again—counts one, three, four and five. The first essential element: the Government must prove beyond a reasonable doubt that one or more of the defendants devised or intended to devise a scheme or artifice to defraud, specifically, a scheme or artifice with one or both of the two following objectives: one, the first alleged object was to defraud the Raytheon Company of its right to the honest, conscientious, faithful, loyal, disinterested and unbiased services, actions and performance of duties by its employees, Roy R. Carver and Joseph C. Lemire, free from bribery, corruption, partiality, willful omission, bias, dishonesty, deceit, misconduct and fraud.

And the second alleged object of the scheme or artifice was to obtain money from the Raytheon Company by means of false pretenses and representations which defendants knew would be and were false when made.

Now, that's the first essential element. The Government must prove that one or more of the defendants devised or intended to devise a scheme or artifice to defraud. Specifically, a scheme or artifice with one or both of the two following objects, and I told you that the first alleged object was to defraud Raytheon of its right to the honest, et cetera, services of its employees Carver and Lemire and/or [3240] two, the second alleged object of the scheme or artifice was to obtain

money from the Raytheon Company by means of false pretenses and representations which defendants knew would be and were false when made.

Now, that's the first essential element.

The second essential element which the Government must prove beyond a reasonable doubt of wire fraud that the Government must prove is an act or acts of transmitting or causing to be transmitted any writing, signs, signals or sounds over the wires in interstate or foreign commerce. Counts one, three, four and five allege such transmittions to have occurred on or about September 21, 1976, January 7, 1977, January 24, 1977, and January 26, 1977.

The third element—the third essential element is that the act of transmitting or causing such transmission must be willful and with the specific intent to carry out some essential step in the execution of said scheme or artifice to defraud.

As stated before, and it is true for every count in the indictment, the burden is always on the Government to prove beyond a reasonable doubt every essential element of the crime charged. The law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Now, that is the instruction I gave you as to the [3241] essential elements of fraud by wire.

Ms. Thornhill, do you think the jury is satisfied with this reinstruction?

THE FOREPERSON: Yes, Your Honor.

THE COURT: Very well, thank you very much. I will return you to the custody of the Deputy Marshal.

(Whereupon, the jury left the courtroom for deliberations at approximately 4:05 P.M.)

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No. 83-1413

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOSEPH C. LEMIRE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in affirming petitioners' convictions when it concluded that a jury instruction setting forth one of the government's theories of fraud was improper, but that there was no substantial possibility that the jury had rested its verdict on that theory.

2. Whether the district court acted lawfully in imposing restitution orders as part of the sentences imposed on petitioners Stephens and Achuck.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-50a) is reported at 720 F.2d 1327.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 1983. A petition for rehearing was denied on January 11, 1984 (Pet. App. 52a). The petition for a writ of certiorari was filed on February 24, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Columbia, each petitioner was convicted on four counts of wire fraud, in violation of 18 U.S.C. 1343 (Counts 1, 3, 4, and 5), one count of interstate transportation of a security taken by fraud, in violation of 18 U.S.C.

2314 (Count 2), and one count of conspiracy, in violation of 18 U.S.C. 371 (Count 7).[1]

Petitioner Lemire was sentenced to concurrent terms of five years' imprisonment on each count and to a total of $19,000 in fines. Petitioner Stephens was sentenced to concurrent terms of five years' imprisonment on Counts 1, 3, 4, 5, and 7, and to a total of $19,000 in fines. Stephens was sentenced on Count 2 to a term of five years' imprisonment, suspended in favor of probation conditioned on payment of $1,000,000 in restitution to the victim of the fraud. Petitioner Achuck was sentenced to six concurrent five-year terms of imprisonment, all of which were suspended in favor of probation, conditioned on performance of 300 hours of community service and payment of $750,000 in restitution to the victim of the fraud. Achuck was also sentenced to a total of $19,000 in fines. Petitioner Interconex, Inc. was fined a total of $24,000.

1. The evidence at trial showed that petitioners devised a scheme to defraud the Raytheon Company by, inter alia, diverting over two million dollars of company funds to their own accounts in connection with contracts for the shipment of modular homes to Saudi Arabia. Petitioner Lemire was the manager of the Raytheon subsidiary that was responsible for procurement and shipment of the housing to Saudi Arabia. Petitioners Stephens and Achuck were co-owners of petitioner Interconex, a freight forwarding company based in New York. Pet. App. 3a-4a.

In 1976, in connection with a contract to construct a missile system for Saudi Arabia, Raytheon agreed to provide housing for its personnel stationed in Saudi Arabia.

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[1]Count 6 was dismissed on the government's motion at the close of its case (Tr. 2060-2061).

Although Raytheon previously had used Interconex for some of its shipping to Saudi Arabia, by 1976 Raytheon had a policy of requiring all divisions to use Behring International for freight forwarding and prohibiting use of Interconex, either directly or through subcontracts. Pet. App. 4a; Tr. 771, 1133-1135, 1215; Gov't Exh. 136(c). Raytheon also had an agreement with the Waterman Steamship Line to provide transportation for small amounts of Raytheon goods to Saudi Arabia at a rate of $164.50 per ton (Pet. App. 4a; Tr. 1135-1136, 1154). That agreement did not require Raytheon to use Waterman exclusively (Tr. 1177-1178).

During this period, Raytheon had a policy prohibiting employees from accepting items of value from any organization that supplied, or sought to supply, goods or services to Raytheon. Lemire signed a card each year, including 1976, representing that he had complied with this conflict of interest policy. The policy required employees to report any conflict of interest that arose after cards were signed. Another Raytheon policy required that all competing bidders for Raytheon contracts be given the same bidding information at the same time. Pet. App. 4a.

In late May of 1976, Lemire directed his assistant to ask International Modular Systems, Ltd. (IMS) to make a proposal for the sale and transportation of 220 modular homes to Saudi Arabia. On June 7, Stephens met with IMS representatives to discuss the Raytheon housing project and advised them that Interconex was already providing shipping services for Raytheon. Stephens urged an arrangement under which IMS would provide the housing for the Raytheon project and Interconex would provide the transportation; he suggested that IMS would get additional Raytheon business as a result. When the IMS representatives accepted a written proposal, Stephens informed them that the cost of

transportation would be between $20 and $22 per square foot. One of the IMS representatives noted that Stephens' estimate appeared to be much higher than estimates IMS had received from other companies, but Stephens replied that he was confident that IMS would win the contract, even at the shipping rate he was quoting. Pet. App. 4a-5a; Tr. 191, 199-204, 206-208, 211-213, 369, 376, 378-379, 751; Gov't Exh. 8.

On June 9, Lemire provided an IMS representative with most of the bid specifications for the housing contract. At a June 21 meeting Lemire urged IMS representatives to use Interconex for shipping and stated that Raytheon and Interconex had a continuing business relationship. On the same day Lemire's assistant advised modular house manufacturers of the housing contract and requested bids, which were to include shipping costs, within two days, *i.e.*, by June 23. Lemire subsequently awarded the contract to IMS, which had submitted the lowest bid. When another Raytheon official questioned Lemire's decision to have manufacturers include shipping in their bids, Lemire responded that he believed this approach would save money for Raytheon. Pet. App. 5a; Tr. 216-217, 220-221, 223, 225, 228, 469, 591-592, 764, 928, 930; Gov't Exh. 14(a), 17; Gov't Exh. 22, at 4.

IMS and Interconex then entered into a subcontract for transportation of 220 houses. Although IMS had quoted a transportation price of $20.50 per square foot as part of the bid it submitted to Raytheon, the subcontract provided that IMS would pay Interconex only $12.65 per square foot. The remaining $7.85 per square foot was to be paid by separate check to Generation Holdings, a Liberian company controlled by Achuck. Stephens advised IMS that it should not make any reference to Generation Holdings in its dealings with Raytheon. Pet. App. 5a-6a; Tr. 255, 257-258, 261-264, 283, 381-382, 454; Gov't Exh. GH5, 20.

Later in the summer of 1976 Raytheon awarded IMS another contract for housing units, based on a bid including a quotation of $23 per square foot for transportation costs — a figure used at Stephens' request. In connection with the second contract, IMS agreed to pay $12.65 per square foot to Interconex and $10.35 per square foot to Generation Holdings. Some of the funds paid to Generation Holdings eventually were funnelled to other offshore companies controlled by petitioners and Roy Carver, another Raytheon official.[2] Pet. App. 6a; Tr. 269, 277, 383, 785-787; Gov't Exh. GH6, 15, 16, 39, 40. None of those companies had any offices or employees (Tr. 1396-1397, 1399, 1414-1415, 1425, 1682).

On September 22, following a telephone call from Stephens to IMS, Stephens' attorney picked up a check in the amount of $775,008, made out to Generation Holdings, from the Washington, D.C. office of IMS. IMS subsequently made two wire transfers of $678,240 each to a Generation Holdings bank account in Switzerland, for a total of $2,131,488 out of the $5,264,400 Raytheon paid to IMS for transportation under the two contracts. Approximately half of the amount that went to Generation Holdings was funnelled to a company controlled by Stephens and Achuck, while most of the rest appeared to have been transferred to Lemire and Carver. Pet. App. 6a; Tr. 478, 480, 1432-1437, 1588, 1593, 2028-2029, 2680-2681; Gov't Exh. GH20, GH23, GH29, GH30, CT13-CT15, CT19, Red 19, Red 21-Red 23, Red 27-Red 32, Price 1-Price 2, Price 4-Price 6.

Raytheon began an investigation of the IMS contracts in the fall of 1976. Lemire advised company officials that he did not know who arranged the shipping for IMS. Both

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[2]Carver was indicted with petitioners. His case was severed from that of petitioners, and he later pleaded guilty. Pet. App. 7a & n.4.

IMS and Interconex refused to provide Raytheon with shipping cost information. Stephens urged IMS not to provide the information and informed IMS representatives that "contacts" within Raytheon had advised them "just to hold tight and that everything would blow over in due course" (Tr. 401). Raytheon directed Interconex to cancel the fourth and final shipment of houses and itself chartered a boat to ship the houses, thus saving approximately $700,000. A Raytheon reviewer concluded that the company appeared to be paying between $600,000 and $900,000 in excess charges on each of the shipments under the two contracts. Pet. App. 6a; Tr. 971, 975, 977, 1066-1067, 1148.

2. The court of appeals affirmed the convictions (Pet. App. 1a-50a). The court of appeals agreed with petitioners' contention that a wire fraud conviction could not rest solely on an employee's intentional failure to disclose a conflict of interest; rather, such a failure to disclose must be "in furtherance of a scheme to defraud Raytheon of a business opportunity or economic benefit" (*id.* at 16a). The court concluded, however, that while a portion of the jury instructions read in isolation might be interpreted to permit a conviction solely on the basis of the failure to disclose Lemire's conflict of interest, the instructions as a whole made clear that the jury was required to find that the scheme involved economic harm to Raytheon. Moreover, the verdict on Count 2, finding petitioners guilty of interstate transportation of a security taken by fraud, indicated that the jury found that Raytheon had suffered economic loss of at least $775,008. The court also noted that the evidence at trial and the arguments of counsel made it "extremely unlikely" (*id.* at 23a) that the jury rested its verdict on the theory of fraud the court had rejected. Since the court found no "substantial possibility" (*id.* at 27a) that petitioners had been convicted on an improper theory of wire fraud, it concluded that any error in the jury instructions could not

have prejudiced petitioners. The court also concluded that there was no material variance between the charges in the indictment and the jury instructions (*id.* at 27a-33a).

The court of appeals also rejected petitioners' challenges to the trial court's evidentiary rulings (Pet. App. 33a-43a), as well as Achuck's claim that there was insufficient evidence to support his conviction (*id.* at 43a-45a). The court held finally (*id.* at 45a-50a) that the restitution orders entered as part of the sentences of Stephens and Achuck were supported by the record and were within the discretion of the district court.

ARGUMENT

1. Petitioners contend (Pet. 10-15) that the court of appeals' failure to reverse their convictions for wire fraud, despite its conclusion that one of the government's theories of fraud was unsound, conflicts with *Stromberg* v. *California*, 283 U.S. 359 (1931), and its progeny. That contention is without merit.

In *Stromberg* the trial court instructed the jury that the defendant could be convicted under any one of three clauses of a statute, one of which subsequently was held unconstitutional. The Court reversed the defendant's conviction, finding itself unable to determine whether the jury had relied on the unconstitutional clause or on one of the other clauses. Petitioners claim that this case is analogous to *Stromberg*, because the jury might have convicted them on the theory the court of appeals rejected (*i.e.*, that petitioners had sought to defraud Raytheon of the loyal and honest services of Lemire and Carver), rather than on the theory approved by the court (that petitioners had sought to defraud Raytheon of a business opportunity or economic benefit).

In fact, the record in this case shows that *Stromberg* is simply inapposite. More recent cases make it quite clear that the rule in *Stromberg* applies only when the reviewing

court is unable to tell from the record whether the verdict rested on an insufficient ground. See, *e.g.*, *Zant* v. *Stephens*, No. 81-89 (June 22, 1983), slip op. 18 ("[t]he cases in which [the *Stromberg*] rule has been applied all involved general verdicts based on a record that left the reviewing court uncertain as to the actual ground on which the jury's decision rested"). Here the court of appeals was able to determine that the jury convicted petitioners under a proper theory, not under the theory the court rejected. Based on a review of the evidence, arguments of counsel, jury instructions, and verdict, the court concluded that there was no "substantial possibility" (Pet. App. 27a) that the verdict rested on an improper legal theory.[3] Indeed, the court stated (*id.* at 50a) that it was "confident that the jury convicted the defendants only after finding that the defendants' scheme contemplated a pecuniary loss of some kind to Raytheon."

The court of appeals concluded specifically that in light of the context of the trial, including the actual evidence and arguments presented, it was "extremely unlikely" that the jury convicted on the basis of the theory the court rejected

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[3]Petitioners suggest (Pet. 12 n.13) incorrectly that the decision below is inconsistent with *Street* v. *New York*, 394 U.S. 576 (1969). The Court in *Street* inquired whether "the record negates the possibility" (*id.* at 588) that a conviction was based on unconstitutional grounds. That is essentially the test used by the court of appeals here when it found no "substantial possibility" that the jury relied on the legal theory the court rejected (Pet. App. 27a).

Chiarella v. *United States*, 445 U.S. 222 (1980), cited by petitioners (Pet. 11), is inapposite. In *Chiarella* the Court declined to consider the validity of an alternative theory offered by the government to support the conviction, since the theory had not been presented to the jury. The Court noted that it would have reversed the conviction even if the jury had been instructed in the alternative, in a manner that would make it impossible to tell whether the defendant had been punished for non-criminal conduct. 445 U.S. at 237 n.21. Here, in contrast, the court of appeals was able to determine that the jury did not base its verdict on the theory the court found improper.

(Pet. App. 23a). Petitioners themselves acknowledged in their court of appeals brief that "[t]he evidence introduced by the government during the trial focused on . . . alleged excessive charges" (*ibid.*). In addition, the government's closing argument focused on a scheme to defraud Raytheon of money by overcharging or denying it the opportunity to ship goods more cheaply, with "explicit[] and exclusive[]" reference to receipt of a $2.1 million dollar kickback (*id.* at 23a-24a & n.23). See also *id.* at 7a.

The jury's verdict confirms that it did not rely on the theory of fraud the court of appeals rejected. The jury convicted all petitioners on count two, which charged interstate transportation of a security taken by fraud. In order to do so, the jury must have concluded that the $775,008 check paid to Generation Holdings was "taken by fraud" through operation of petitioners' scheme. As the court of appeals noted (Pet. App. 25a-26a), the conviction on count two therefore carries the necessary implication that the jury found that petitioners defrauded Raytheon of at least $775,008 and that the conviction on the mail fraud counts rested on that finding.

The court of appeals noted (Pet. App. 19a) that one portion of the jury instructions "conceivably" could be interpreted to permit a conviction solely on the basis of petitioners' failure to disclose Lemire's conflict of interest.[4] However, the court concluded correctly that the instructions as a whole do not permit that inference. See, *e.g.*, *United States* v. *Park*, 421 U.S. 658, 674-675 (1975); *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973). Immediately

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[4]As the court of appeals noted (Pet. App. 26a), petitioners failed to object to the jury instructions on the ground they now urge. Indeed, they apparently acquiesced explicitly on the point they raise in their petition (*id.* at 26a n.24). Of course, had petitioners expressed their objection at trial, the court would have had the opportunity to clarify the instructions. See Fed. R. Crim. P. 30.

following the instruction at issue, the trial court instructed the jury that more was required to convict petitioners than a breach of their "duty of loyalty" to Raytheon and that such a breach would violate the wire fraud statute only if accompanied by a "material" non-disclosure. Other instructions required the jury to find that petitioners contemplated some "actual harm or injury" and that they had the purpose of causing financial loss to another or bringing about financial gain to themselves (Pet. App. 21a-22a). And in any event, even if the instructions had not made it entirely clear that the jury was required to find that petitioners' scheme involved depriving Raytheon of a substantial sum of money, petitioners could not have suffered prejudice, since the jury's verdict on count two reflects such a finding.[5]

2. Petitioners Stephens and Achuck contend (Pet. 15-21) that the restitution orders imposed by the district court as a condition of their sentences of probation, in the amounts of $1,000,000 and $750,000 respectively, were unlawful. That contention lacks merit.

We note at the outset that petitioner Achuck appears to have waived his right to challenge the restitution order. In a memorandum filed the day before Achuck's sentencing proceeding, his counsel strongly urged a non-custodial sentence. In support of his plea for leniency, Achuck's counsel represented that Achuck would not oppose an order of restitution in any amount the court deemed appropriate: "Consistent with Mr. Achuck's sincere feeling of

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[5]Petitioners lay particular emphasis on the trial court's reinstruction on the elements of wire fraud. See Pet. 14. However, petitioners called attention to the reinstruction in their court of appeals brief (at 33). The court of appeals nevertheless concluded that it was "confident" that the jury found a scheme involving pecuniary loss to Raytheon (Pet. App. 50a). In view of the ample support for the court's conclusion, it was entirely justified in determining that the reinstruction did not require reversal of petitioners' convictions.

sorrow and remorse, he is fully prepared to make restitution in any amount the court considers appropriate without any challenge whatsoever" (Pet. App. 45a n.37). During the sentencing proceeding, Achuck's counsel reiterated that Achuck was "fully prepared without challenge to assume whatever burden of special costs and restitution you deem appropriate for him. I won't say another word about it. We give you that assurance" (Dec. 16, 1982, Tr. 7).

Of course, the representations made by Achuck's counsel would not constitute a waiver of his right to appeal from his conviction or to challenge a restitution order that bore no relation to the fraud for which he was convicted. Here, however, the indictment charged, and the evidence showed, that Raytheon suffered a loss of more than two million dollars as a result of the fraud. Under these circumstances, Achuck's representations to the district court clearly constitute an adequate basis for the $750,000 restitution order. See *Phillips* v. *United States*, 679 F.2d 192, 194-196 (9th Cir. 1982); *United States* v. *Davies*, 683 F.2d 1052, 1055 (7th Cir. 1982); *United States* v. *Landay*, 513 F.2d 306, 308 (5th Cir. 1975).

In any event, the restitution orders entered against Stephens and Achuck are valid. The Probation Act provides that, as a condition of probation, the defendant may be required "to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had." 18 U.S.C. 3651.[6] That provision has been interpreted generally to limit restitution to the losses "flowing from the offense for which the defendant has been convicted." *United States* v. *Johnson*, 700 F.2d 699, 701 (11th Cir. 1983) (citations omitted); *United States* v.

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[6]A new statute, 18 U.S.C. 3579 *et seq.*, governs the authority of district courts to order restitution in connection with offenses committed after January 1, 1983.

Orr, 691 F.2d 431, 433-434 (9th Cir. 1982). Restitution may be ordered for all damages "directly caused by the illegal activity with which a defendant is charged." *United States* v. *McMichael*, 699 F.2d 193, 195 (4th Cir. 1983).

While a restitution order must be based on the loss flowing from the counts on which the defendant was convicted, it is not necessary that the jury's verdict conclusively establish the size of the loss. Thus, restitution may be ordered in connection with a conspiracy count that alleges a loss to the victim, even though the jury could have convicted without finding that the loss actually occurred. See *United States* v. *Tiler*, 602 F.2d 30, 33-34 (2d Cir. 1979). Likewise, restitution orders are commonly entered following mail or wire fraud convictions, even though the jury need not find that the fraud was actually effected or that the victims suffered a loss as a result of the fraud. See *United States* v. *Roberts*, 619 F.2d 1 (7th Cir. 1979).

Like other sentencing decisions, the task of determining the amount of the victim's loss is left to the discretion of the sentencing court. See *United States* v. *Roberts*, 619 F.2d at 2. See also *United States* v. *Johnson*, 700 F.2d at 701; *United States* v. *Lynch*, 699 F.2d 839, 845-846 (7th Cir. 1982); *United States* v. *McMichael*, 699 F.2d at 194-195; *United States* v. *Davies*, 683 F.2d at 1055. So long as there is an adequate factual basis in the record for the district court's findings as to the size of the loss and the relationship of the loss to the offenses charged in the indictment, the restitution order will be upheld. See *United States* v. *Lynch*, 699 F.2d at 845-846; *United States* v. *Brown*, 699 F.2d 704, 712 (5th Cir. 1983); *United States* v. *McMichael*, 699 F.2d at 195; *United States* v. *Taylor*, 305 F.2d 183, 188 (4th Cir.), cert. denied, 371 U.S. 894 (1962).

Here the district court clearly did not abuse its discretion in imposing the restitution orders on Achuck and Stephens. The wire fraud and conspiracy counts of the indictment

alleged that the diversion of Raytheon funds resulted in payment of a bribe of $1,049,000 to Carver and Lemire and payment of an additional $1,046,000 to Achuck and Stephens. The evidence at trial showed that Raytheon lost between $600,000 and $900,000 per shipment by not itself chartering a boat. In addition, the evidence showed that Generation Holdings received approximately $2,100,000 from its contract with Interconex and that Lemire, Carver, Stephens, and Achuck subsequently shared that amount among themselves. See Pet. App. 49a. The court of appeals correctly concluded (*ibid.*) on the basis of that evidence that the district court could have properly assessed one million dollars each against Achuck and Stephens as " 'the principals of Interconex' " (quoting Stephens Sentencing Tr. 35). That fact-bound conclusion, which provides ample support for the restitution orders, does not warrant further review. See *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).[7]

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[7]The district court's failure to order full restitution by all petitioners does not render its orders arbitrary. The Probation Act does not require that a restitution order be for the full amount of the loss. See *United States* v. *McMichael*, 699 F.2d at 195. The district court concluded that Stephens and Achuck initially received the benefits of the scheme and were the "real masterminds" (Pet. App. 50a n.40). As the court of appeals noted (*id.* at 49a-50a n.40), the fact that Stephens and Achuck shared part of the proceeds of the fraud with Lemire and Carver did not excuse them from responsibility to make full restitution to Raytheon. See *United States* v. *Davies*, 683 F.2d at 1055. The district court apparently reduced the amount of restitution for Achuck because it considered him less culpable and more penitent than Stephens (Pet. App. 50a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 83-1413

IN THE

Supreme Court of the United States

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LIONEL W. ACHUCK and INTERCONEX, INC.,
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v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

1. The government's opposition attempts to disguise the radical character of the court of appeals' decision on the basis of a single, erroneous proposition—that the court of appeals "was able to determine that the jury convicted petitioners under a proper theory, not under the theory the court rejected." Opposition at 8. In fact, the court of appeals did not do so; it did not purport to do so, nor could it have done so. Such a task is impossible in light of the jury's general verdict and the closely contested issue of economic harm.

The opinion below explains precisely what the court of appeals did. It placed the burden on the defendants to demonstrate that the jury acted on the improper theory.

It framed the dispositive question as whether the record "*support[ed] an inference* that the jury acted pursuant to" the erroneous instruction. App. 9a (emphasis supplied). Finding that the record did not affirmatively demonstrate a "significant likelihood" that the jury acted on the invalid theory, the court affirmed. App. 27a.

The government feebly attempts to justify this result under *Street* v. *New York*, 394 U.S. 576 (1969). But *Street* only makes the court of appeals' error clearer. It permits affirmance of a criminal conviction only where the record "negates the possibility" that the conviction was based on the invalid ground. *Id.* at 588 (emphasis supplied).[3]

The court of appeals' approach stands the *Street* standard on its head, shifting the burden to the defendant to prove that the jury acted on the invalid theory. Under *Street*, the test is whether the record proves conclusively that the trier of fact did *not* act on the invalid theory, not whether the record demonstrates that it did. As this Court recently explained in *Zant* v. *Stephens*, 103 S. Ct. 2733 (1983), *Street* holds that where one of the theories submitted to the jury is invalid, a conviction may be upheld only where "there is *no uncertainty* about the multiple grounds on which a general verdict rests." 103 S. Ct. at 2746 (emphasis supplied).

The kind of speculative inquiry conducted by the court of appeals is clearly contrary to the rule of *Stromberg* v. *California*, 283 U.S. 359 (1931), and its progeny.

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[3] Similarly, the government's contention that the conviction on Count 2, transportation of the proceeds of fraud in foreign commerce in violation of 18 U.S.C. § 2314, somehow cures the erroneous wire fraud instruction and justifies the court of appeals' result cannot withstand scrutiny. The jury would have been required to convict on Count 2 if it found a scheme to defraud under either of the government's trial theories. Even if the jury concluded that Raytheon was deprived only of the loyal services of its employees—the wire fraud theory held invalid by the court of appeals—any money received from Raytheon for services rendered would have been "taken by fraud."

Stromberg mandates that where "it is improper to submit a case on one of two alternative theories, a new trial must be granted . . . ." *Government of the Virgin Islands* v. *Richards*, 618 F.2d 242, 244 (3d Cir. 1980).

The government's present argument that the jury could not have convicted on the erroneous theory is directly contrary to its position in the trial court. There, over the objections of the defendants, the government successfully persuaded the trial court to adopt the erroneous fiduciary fraud theory precisely so that the jury could convict without finding economic harm to Raytheon. C.A. 3108.

The facts of this case were hotly contested at trial, particularly as to whether Raytheon suffered any economic harm. The evidence showed that the IMS-Interconex proposal was the *lowest* bid received by Raytheon—more than $1 million lower than that of the nearest competitor, with most of the cost difference found in the transportation component of the bid. In order to circumvent that evidence, the prosecutors argued in the trial court for a two-pronged instruction that required the jury to convict if it found a scheme to deprive Raytheon of *either* money *or* the loyal services of its employees. The prosecutors stated that "the jury should be absolutely clear . . . that [it] can convict on *either* theory and should be so instructed. It's absolutely crucial." C.A. 3108 (emphasis supplied). The trial court charged the jury as the prosecutors requested. The erroneous instruction was the *only* instruction on the elements of wire fraud in the initial charge and, more importantly, the jury was reinstructed on the erroneous theory at the end of its first day of deliberations.[3]

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[3] The government's claim, Opposition at 10 n.5, that the court of appeals fully considered the effect of the erroneous reinstruction is made from whole cloth. Nowhere in its fifty-page opinion did the court of appeals refer to the reinstruction. The absence of any mention of this glaring error best illustrates the fallacy of the court's decision.

Now the government executes a 180° turn, arguing that its "crucial" instruction did not do precisely what both the prosecutors and the trial court intended it to do—permit a conviction without a finding of economic harm. Opposition at 9. And just as the government must now disavow its trial theory, so must it now contend that the court below "was able to determine" the theory on which the jury based its verdict. But, however often the government repeats this proposition, it is simply not true; the general verdict here is as opaque to appellate scrutiny as was the general verdict in *Stromberg*.

The court of appeals' decision makes a mockery of the rule of *Stromberg*, sapping the vitality of a principle based on fundamental guarantees of the Due Process Clause and the Sixth Amendment. It sets a new precedent for appellate speculation into the jury's decision and permits convictions to stand on the flimsy foundation of what an appellate court *thinks* the jury decided. This practical nullification of *Stromberg* merits review by this Court.

2. Contrary to the government's characterization, the restitution question in this case is far from "fact-bound." The court of appeals' affirmance of the restitution order condones the trial court's exercise of broad new power to impose economic judgments without the constitutional protections of the Seventh Amendment right to a jury trial, or even the minimal due process safeguards of a hearing focused on the question of economic injury.

The existence of the vigorous factual dispute on the economic injury point in this case merely serves to highlight the breadth of the stroke taken by the trial court in imposing $1.75 million in restitution based neither on the jury verdict nor on the outcome of a hearing devoted to the question. The potential inherent in the Victim and Witness Protection Act of 1982, 18 U.S.C.A. §§ 3579-80 (West Supp. 1982), for imposition of similar economic sentences without procedural safeguards was the very

reason another district court recently struck down that law as unconstitutional. *United States* v. *Weldon*, 568 F. Supp. 516 (N.D. Ala. 1983), *appeal docketed*, No. 83-7444 (11th Cir. August 18, 1983). The analysis of *Weldon* has now been cited with approval in another recent case. *St. Paul Fire and Marine Insurance Company* v. *Cox*, No. 78-G-1236-M (N.D. Ala. 1984), slip op. at n.2.

The question whether the Seventh Amendment and Due Process rights of criminal defendants may be so lightly tossed aside merits review by this Court.

CONCLUSION

For the reasons set forth above and in their petition, petitioners respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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